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EX PARTE OR LATE FILED

November 13,2002

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Please find Globalcom, Inc.'s ***exparte*** letter with attachment enclosed to be filed in the above referenced proceedings. I have enclosed one original and seven copies (one copy for the Secretary's office and two copies for filing in each of the above referenced proceedings).

Please note that an original of the ***exparte*** letter that was previously sent via regular mail to Mr. Maher and copied to you erroneously omitted a copy of the attachment. Please disregard that correspondence.

If you have any questions regarding this filing, please feel free to contact me directly at (312) 895-8873.

Very truly yours,

M. Gavin McCarty
Chief Legal Officer
Globalcom, Inc.

Encl: **1** Original
7 Copies

cc: William Maher
Thomas Navin
Robert Tanner
Jeremy Miller
Julie Veach
Daniel Shiman

No. of Copies rec'd 0+8
List ABCDE

GLOBALCOM

November 11,2002

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Maher:

Globalcom, Inc. ("Globalcom"), a privately held competitive local exchange telecommunications provider, files this *ex parte* letter to further comment on why requesting camers should be able to obtain a "fresh look at long term special access commitments when existing special access circuits are converted to Unbundled Network Elements ("UNEs").

The Commission in the Notice of Proposed Rulemaking invited comment on whether and on what bases competitive carriers may be able to obtain a "fresh look" at long term special access commitments.' Globalcom proposes that competitive camers be permitted a "fresh look *when a competitive carrier commits to maintain the converted UNE loop and transport combinationfor the remaining duration of the special access contract term.* In such a case, the incumbent local exchange carrier ("ILEC") would recover its non-recuning and recumng special access tariff charges assessed prior to the conversion of the circuit and would recover the TELRIC rates for the same facilities for the same or longer duration as the CLEC's original commitment for the special access circuit.

This proposal is fair and reasonable for several reasons. First, termination liability provisions within special access tariffs are premised on the notion that the customer is terminating service permanently and are designed to compensate the provider for investing in the network facilities over which the special access services were provided. That premise is not appropriate where the circuit continues to provide service when it is re-classified as a UNE. There is no termination of service when the competitive carrier maintains the circuit, now a UNE loop/transport combination, for the remainder of the term since the circuit is simply retagged as a UNE. There is no change

[1] Review of the Section 251 Unbundline Oblieations of Incumbent Local Exchange Carriers: Implementation of the Local Competition Provision of the Telecommunications Act of 1996: Deployment of Wireline Services Offerine. Advanced Telecommunications, CC Docket **Nos.** 01-338,9698, & 98-147, Notice of Proposed Rulemaking, FCC 01-361, ¶ 80 (rel. Dec. 12,2001).

in the functionality of the circuit and no disconnection or interruption of service. Basically, this is nothing more than a billing change.

Second, termination fees result in an inequitable monetary windfall for the ILEC. This is so because the ILEC recovers both special access termination fees for circuits that the CLEC will continue to use and TELRIC rates for a period of time that is no shorter than the original term of the special access contract.

Third, termination fees are anti-competitive since they unfairly increase the operating expenses of competitive carriers and effectively remove the economic benefit of converting existing special access circuits to UNEs. By making it uneconomical to convert these circuits to UNEs, termination fees force competitive carriers to continue to pay higher special access rates rather than TELRIC based UNE rates.

Fourth, the assessment of termination fees is patently unjust. Competitive carriers purchased special access circuits as substitutes for UNEs and loop/transport combinations. **As** the Commission is well aware, the United States Supreme Court held that the Commission's rules on combinations of network elements did in fact comply with the Telecommunications Act of 1996 and that the Eighth Circuit erred in vacating Rules 315(c)-(f). Thus, but for the Eighth Circuit's ruling err, competitive carriers would not have ordered special access circuits and ILECs would not have been able to force higher special access rates or cost prohibitive termination fees on competitive carriers who only needed the underlying UNEs. It is patently unfair to allow the ILECs to collect termination fees in these circumstances.

It is for these reasons the FCC should find that a CLEC should be relieved of termination penalties when it converts special access circuit(s) to UNE(s) so long as the CLEC agrees to purchase the UNE(s) over the same or longer duration as the CLEC's original commitment for the special access circuit. The Commission has the authority to render such a decision and has exercised such authority in similar circumstances in the past.

Termination Fees Are Improper Because There Is No Termination Of Service If The CLEC Maintains The Loop/Transport Combination For The Remainder Of The Term

The Illinois Commerce Commission ("ICC") recently addressed the issue of whether the conversion of a special access circuit to a UNE loop/transport combination under the terms of Ameritech Illinois' intrastate special access tariff should trigger special access early termination fees if the conversion is made prior to the end of the term

of the agreement? The ICC is one of the first public utility commissions to have closely examined this issue under the terms of an intrastate special access tariff. [3]

The ICC concluded that no "termination" occurs, within the meaning of that tariff, for the purposes of collecting early termination charges, when the circuit is converted, so long as, the competitive carrier agrees to maintain the UNE loop/transport combination for the *remainder* of *the special access term.* The ICC held that the termination charge contained in the intrastate special access tariff is

> not designed for the situation presented here, where the provider-customer relationship continues with respect to the pertinent functionality, albeit under what amounts to a greater discount then originally contemplated. The customer's continuing term commitment shields the provider from the risk of carrying unused facilities. The continuing revenue stream also insulates the provider against additional economic loss, because the forward looking cost of service is accounted for through the TELRIC cost-determination methodology.[4]

Ameritech Illinois' intrastate special access tariff mirrors its interstate special access tariff, so the FCC can readily apply the ICC's analysis to the federal tariff.

Special Access Termination Fee Clauses Are Not Designed For Conversions

Significantly, in rendering its decision, the ICC concluded that the termination fee provisions contained within special access tariffs *were not designed nor intended for the circumstance of a conversion.* As explained above, the termination fee provisions are predicated on the fact that the customer is actually terminating service and no longer using the facilities or functionality of the circuit. Conversions, on the other hand, result in the CLECs continued use of the facilities and functionality of the circuit, albeit in a UNE form. Moreover, the ILEC continues to receive compensation for the circuit through TELRIC rates.

Termination Fees Result In A Windfall

Moreover, the application of the termination fee provisions to conversions are economically damaging to CLECs and, since they are not designed for these circumstances, unfairly and wrongly result in a monetary windfall to the ILEC. The

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[2] Globalcom. Inc. v. Illinois Bell Telephone Comoanv d/b/a Ameritech Illinois, ICC Docket 02-0365, (Ill. C.C. Oct. 23,2002). Final Order attached hereto as Attachment 1.

[3] Notably, the ICC was asked to render a decision that interpreted Ameritech's FCC tariff but the ICC chose not to do ***so*** due to jurisdictional concerns. Id. at **44.**

[4] Id. at 12

ILEC not only continues to receive revenue under TELRIC, it also receives a lump sum payment in termination fees that in many cases is ten to twenty times the monthly recumng cost. In Globalcom's specific set of circumstances, Globalcom would have had to pay approximately **$1.3** Million in termination fees in order to convert its circuits and consequently wait over a year before it could recoup the termination fees through savings recognized by converting the circuits. Globalcom witnesses who testified in the ICC proceeding stated that the termination fees were not only cost prohibitive but also removed the benefits of TELRIC versus retail special access. Consequently, they explained that it made no economic sense to convert the circuits.

More importantly, as the ICC concluded, CLECs "continuing term commitment shields the provider from the risk of carrying unused facilities. The continuing revenue stream also insulates the provider against additional economic loss, because the CLEC will pay the ILEC the TELRIC rates for the facilities."[5] If ILECs are permitted to assess termination fees when circuits are converted, ILECs will be recipients of an unjust, unreasonable, and inequitable windfall. Specifically, the ILEC receives the retail rates that were actually paid by the CLEC prior to conversion, a termination fee (which is the dollar difference between the term that could have been completed prior to conversion), plus TELRIC rates for the remainder of the original term, if not longer. The termination fee in these circumstances is, therefore, improper.

Termination Fees Create An Economic Disincentive To Convert Special Access To UNEs

Having the right to convert existing special access circuits to UNEs has no benefit if the cost of converting the circuits is economically infeasible. One of the purposes of **a** termination fee is to ensure that the customer maintains the circuit for the duration of the term, Here, that objective results in ILECs ensuring that CLECs maintain special access circuits, not UNE combinations of loopltransport. This results in higher operating costs for CLECs which places them at a competitive disadvantage to ILECs.

The requirement that CLECs make large up front termination payments for conversions is a significant economic disincentive to convert circuits that were ordered from special access tariffs to UNE combinations. This is especially true for small to medium sized carriers, such as Globalcom, that simply cannot afford let alone justify the large up front payments!

Termination Fees Are Unjust

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5 Id. at 12.

6 It should he noted that Ameritech Illinois has attempted to file with the ICC revised cost studies and tariffs that would significantly increase UNE rates. The prospect of significantly higher UNE rates in the near future makes the payment of termination fees even more of a disincentive and economically unfeasible.

Because Circuits Were Ordered From Special Access Tariffs Since UNE Combinations Were Unavailable At The Relevant Time

It bears emphasis, as the ICC also noted that UNE loop/transport combinations were not available to competitive carriers when ILEC UNE combination obligations were being litigated during the time that these special access circuits were ordered.[7] Competitive carriers had to order special access services as a substitute for **UNE** combinations even though the Supreme Court ultimately determined that Rules 315(c)-(f) should not have been vacated by the Eighth Circuit. It is therefore patently unfair and inequitable to permit ILECs to interpret their tariffs in a manner that allows them to assess termination fees when CLECs should have been able to order UNE combinations of loop and transport in the first instance.

The Commission Has The Authority To Relieve CLECs From Paying Termination Fees When Special Access Circuits Are Converted To UNEs

The FCC has ample authority to relieve CLECs of such termination penalties under section 4(i) of the 1934 Act as well as section 251 of the 1996 Act. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful.. .and to modify other provisions of private contracts when necessary to serve the public interest."[8] The FCC has exercised this authority many times in the past with respect to "fresh look" requirements.[9]

Notably, in a matter similar to the circumstances presented here, the FCC relieved competitive camers of termination penalties when it was apparent they would create

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[7] Id. at 14.

[8] Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

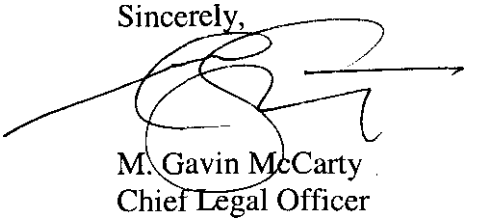
[9] See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 & 95-185, First Report and Order, 11 FCC Rcd 15499, ¶ 1095 (1996) ***("Local Competition First Report and Order")*** (subsequent history omitted) (citing Exuanded Interconnection with Local Teleuhone Company Facilities, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463-7465 (1992), recon., 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), vacated on other grounds and remanded for further proceedings sub. nom. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (1994): Comoetition in the Interstate Interexchanee Marketplace, CC Docket No. No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in the context of 800 bundling with interexchange offerings); Amendment of the Commission's Rules Relative to Allocation of 849-851/894-896 MHz Bands, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) ('fresh look" requirements imposed in the context of air-ground radiotelephone service as condition of grant of Title III license)).

inequitable results that are inconsistent with the purposes of Section 202(a) of the Act." In particular, because of these concerns and because it was ordering ILECs to convert all individual case basis ("ICB") pricing for DS3 services to generally available rates, the FCC held that it "will not permit LECs to assess converted ICB customers termination liability charges or non-recuning charges."" Similarly, because UNE combinations were only available at special access rates and are now available at UNE rates, the FCC should not permit ILECs to assess converted special access customers termination liability charges. As the FCC found in the *ICB DS3 Service Offering* ***Order,*** to do otherwise would "create inequitable results.[12]

Proposed Relief

In its Triennial Review, the Commission should rule there is no termination of service during the conversion of a circuit ordered from an interstate special access circuit to EELs when the CLEC has committed to continue to use and pay TELRIC rates for the facilities and functionality of the circuit for the remainder of the original term. The FCC has provided such relief in the past and should determine that termination fees under the interstate special access tariffs are not applicable and not appropriate in such circumstances.

Sincerely,



M. Gavin McCarty
Chief Legal Officer
Globalcom, Inc.

Attachment

cc: Marlene Dortch
Thomas Navin
Robert Tanner
Jeremy Miller
Julie Veach
Daniel Shiman

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[10] **See Local Exchange Carriers' Individual Case Basis** DS3 **Service Offerings, CC Docket No.** 88-136, 4 **FCC** Rcd. **8634,** ¶¶ *78-79* **(1989)** (*"ICB DS3 Service Offering Order")*

[11] **Id.**

[12] Id.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

October 24,2002

Re: 02-0365

Dear Sir/Madam:

Attached **is** a **certified** copy of the Order entered by this Commission. Related memorandums **will** be available on **our** web site (eweb.icc.state.il.us/e-docket) in the docket number referenced above.

Sincerely,

Donna M. Caton

Donna M. Caton
Chief Clerk

Enc.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Globalcom, Inc
-vs-
Illinois Bell Telephone Company, d/b/a
Ameritech Illinois **02-0365**

Complaint pursuant to 220 ILCS 5/13-515, :
220 ILCS 5/10-101 and 10-108.

ORDER

October **23, 2002**

02-0365

TABLE OF CONTENTS

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Globalcom, Inc
-vs-
Illinois Bell Telephone Company, d/b/a Ameritech Illinois : **02-0365**

Complaint pursuant to 220 ILCS 5113-515, 220 ILCS 5/10-101 and 10-108. :

ORDER

By the Commission:

I. PROCEDURALBACKGROUND

On May 16, 2002, Globalcom, Inc. ("Glob;.-om"), filed a Verified Complaint with this Commission to address certain alleged violations by Ameritech Illinois ("Ameritech) of Sections 13-514[1] and 9-250[2] of the Public Utilities Act ("PUA) and 83 Ill. Admin. Code 766. On May 24, 2002, Globalcom filed an Amended Verified Complaint ("Amended Complaint"). Globalcom's claims pertain to the availability of, and terms and conditions associated with, a combination of unbundled network elements ("UNEs") known as enhanced extended loops ("EELs") provided by Ameritech.

Pursuant to proper legal notice, pre-trial hearings were held on May 30 and July 9, 2002, before a duly authorized Administrative Law Judge ("ALJ") at the Commission's offices in Chicago, Illinois. During the May 30 hearing, the parties agreed to extend this proceeding beyond the otherwise-applicable time limits established in section 13-515[3] of the PUA.

On May 30, Ameritech filed both its Answer and a Motion to Dismiss the complaint ("Motion"). The Motion was granted in part and denied in part by an ALJ's Ruling on July 5.

Evidentiary hearings were held on July 16-18, 2002. Globalcom presented testimony from Eric Wince (Globalcom Ex. 1.0 and 5.0), Roger Wurster (Globalcom Ex. 2.0 and 6.0), Megan Pozzi/Gregory Robertson (Globalcom Ex. 3.0, 7.0 and 9.0), and Michael Starkey (Globalcom Ex. 4.0 and 8.0). Ameritech presented testimony by Margaret Beata (Ameritech Ex. 1.0), Deborah Fuentes-Niziolek (Ameritech Ex. 2.0),

[1] 220 ILCS 5/13-814.
[2] 220 ILCS 5/9-250.
[3] 220 ILCS 5/13-515.

Sandra Douglas (Ameritech Ex's. 3.0 and 3.1), W. Karl Wardin (Ameritech Ex's. 4.0 and 4.1), Craig Mindell (Ameritech Ex. 5.0), Chris Cass (Ameritech Ex. 6.0), Dr. Debra Aron (AI EX. 7.0), and Rich Giminez (Ameritech **Ex.** 8.0). Staff submitted testimony by Dr. James Zolnierek (Staff Ex. 1.0 and 1.1) and Mark Hanson (2.0 and 2.1). At the conclusion of the evidentiary hearings on July 18, 2002, the record was marked "heard and taken."

Initial briefs were received from Staff and Ameritech on Augupt 2 and from Globalcom on August 5. Reply briefs were received from each party on **August 19.** An ALJ's written decision was served on all parties on September 24, 2002.

On October 1, 2002, Globalcom, Ameritech and Staff each filed a petition for review ("PR). On October 7, 2002, each party filed a reply to other petitions for review ("RPR). In this Order, we grant those petitions for review and revise the Written Decision to the extent reflected below.

II. JURISDICTION

Both Globalcom and Ameritech Illinois are telecommunications carriers authorized by the Commission to provide telecommunications services in Illinois pursuant to 220 ILCS 5/13-202 and 5/13-203. This Commission has the authority to regulate telecommunications carriers, as well as to enforce its orders and the PUA. 220 ILCS 5/4-101.

The Commission has jurisdiction to hear complaints involving the entities it regulates. 220 ILCS 5/10-108. It has jurisdiction to address noncompliance with interconnection agreements approved by this Commission pursuant to Section 252 of the federal Telecommunications Act of 1996 ("Federal Act")[4]. The PUA grants the Commission jurisdiction to promote the development of competition in telecommunications service markets and to prohibit and penalize anticompetitive practices. 220 ILCS 5/13-514, 13-515 and 13-516.

III. ANALYSIS

A. Special Access and EELs

Ameritech is the incumbent local exchange carrier ("ILEC") in certain geographic areas of Illinois. Globalcom is a competitive local exchange carrier ("CLEC) that primarily offers bundled packages of local, long distance, and enhanced services to Illinois business customers. Amended Complaint at 3. Globalcom purchases various services from Ameritech in order to provide services to its end-users. The parties also exchange telecommunications traffic pursuant to an interconnection agreement ("ICA) approved by this Commission in accordance with Section 252.

[4] 47 USC 252

Globalcom currently provides telecommunications services in Ameritech-served areas by purchasing the use of special access circuits[5] from Ameritech. The circuits are either DS3s[6] or the smaller DS1s[7]. These circuits are ordered from either a federal interstate tariff[8] or an Illinois intrastate tariff[9]. The rules, regulations and rates in the state and federal tariffs are essentially identical. Ameritech Ex. 3.0 at 4. Under FCC rules, a customer is expected to purchase a circuit from the federal tariff if the interstate traffic on the circuit will exceed ten percent. *Id,* at 3.

Ameritech offers discounted Optional Payment Plans ("OPPs") in connection with its special access circuits. Discounts are available when customers make long-term purchase commitments. "The longer the OPP agreement, the greater the discount." *Id.* at 7. For example, the monthly rate for a DS1 is $255. "The monthly rate for a 12-month OPP is $196 *or* 77% of the monthly rate. The monthly rate for a 24-month OPP is $152 or 60% of the monthly rate. The monthly rate for a 36/48-month OPP is $103 or 40% of the monthly rate. The monthly rate for a 60-month OPP is $93, which is 37% of the monthly rate." *Id.* Even if special access rates increase, "Ameritech commits not to increase the customer's rates to an amount higher than the OPP rate which was in effect when the customer agreed to the OPP option." *Id.* at 6.

Ameritech imposes early termination charges if the customer discontinues service under an OPP before completion of the pre-selected service term". In Ameritech's view the termination penalty "simply assesses the customer charges it would have paid had it chosen a shorter period OPP." *Id.* The customer is also charged "the difference between the nonrecurring charge associated with the minimum period for the service and the nonrecurring charge the customer actually paid." *Id.* at 10. Termination charges are not imposed under certain conditions specified in the tariffs. *Id.* at 14-15. For example, a customer can convert DS1 service to DS3 service, under an OPP of equal or greater duration, without termination penalty. *Id.*

Section 2.0.3 of the parties' ICA expressly refers to special access termination charges: "Requesting Carrier must pay any applicable termination charges for the Special Access Circuits that may be terminated early in order to convert to UNEs." In view of this language, along with the terms of its special access tariffs, Ameritech

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[5] The parties also refer to these as special access "services." "There is no difference between Special Access service and Special Access circuits...These terms are used throughout the industry to describe Special Access service." Ameritech Ex. 3.0 at 4.

[6] "DS3s are facilities (generally fiber) which carry a large stream of data (44 megabits per second) from one place to another. If the equipment on each end of the DS3 is placed to convert the data stream to voice, a DS3 can process 672 simultaneous conversations. DS3s may also carry the data from computer to computer, where the data is interpreted as written text, pictures, or sound." Ameritech Ex. 5.0 at 3.

[7] "A DS1 service is a channel of a DS3 service, which carries 1.544 Megabits per second, or 24 simultaneous voice conversations. 28 DSIs fit on a DS3. When a customer pays for a DS3 and [multiplexing], he has paid for the 28 DSIs." *Id.*

[8] Tariff FCC No. 2.

[9] Ill. CC No. 21.

[10] For example, the federal tariff states: "[c]ustomers requesting termination of service prior to the expiration date of the OPP term will be liable for a termination charge." Amended Complaint at 13. The Illinois tariff mirrors the federal tariff. Ameritech Ex. 3.0 at 13-14.

maintains that termination penalties apply when Globalcom requests conversion of a special access circuit to an EEL.

An EEL, according to the FCC's UNE Remand Order," is a combination of the following UNEs: "unbundled loop, multiplexing/concentrating equipment, and dedicated transport." According to Globalcom, "[i]n a general sense, an EEL is a combination of UNEs (of variable capacity) that connect a customer's premises with a carrier's network, when routed through an intermediate central office." Globalcom Ex. 4.0 at 31. Staff similarly describes an EEL as a "loop/transport combination." Staff Ex. 1.1 at 3.

An EEL is a special access circuit by another name. As a sister state commission explains, when a special access circuit is "converted" to an EEL (that is, when it is purchased from UNE tariffs rather than special access tariffs), it "would continue to serve the same purpose, have the same features, perform the same functions, and service the exact same customer.[12]" Thus, a customer could, for example, "lease DS3s as EELs." Globalcom Ex. 2.0 at **7.**

Globalcom states that the rates for special access, even when discounted under an OPP, are "still far in excess of the cost-based UNE rates" associated with EELs. Globalcom Ex. 4.0 at 18. Staff agrees. "The prices Ameritech charges carriers for special access services exceed those charged to carriers for identical combinations of network elements." Staff Ex. 1.0 at 23. "[T]he recurring rates under special access services are higher than unbundled network element (UNE) rates." Staff Ex. 2.0 at 5.

Ameritech does not deny that EELs and special access are functionally identical or that the price of the latter exceeds the price of the former. Indeed, that price differential is the principal reason for this dispute. Globalcom wants to convert its special access circuits to EELs to lower its operating costs. It claims, however, that the termination penalties associated with special access make this uneconomical.

Accordingly, Globalcom requests that special access termination penalties be deemed inapplicable to conversions to EELs or waived by Commission Order. Globalcom's core rationale for this request is that it would not have purchased special access if EELs had been made available earlier, and that it should not face termination penalties now in order to convert an unwanted service it took only because of Ameritechs purportedly anticompetitive acts and policies.

Ameritech first filed a tariff (the "Interim Compliance Tariff) providing for new EEL circuits, and for the conversion of special access services to EELs, on September 18, 2001. According to Ameritech, the Interim Compliance Tariff was filed to enable

[11] Third Report and Order and Fourth Further Notice of Prooosed Rulemaking, CC Docket No. 96-98, Released November 5, 1999, para. 477.

[12] In Re: Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Prooosed InterconnectionAgreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. 2000-527-C; Order No. 2001-079, South Carolina Public Service Commission, quoted in Globalcom **Ex.** 4.0 at 12.

Ameritech "to offer CLECs the UNE-P [unbundled network element platform] and EEL combinations required by Section 13-801 of the Act (which became effective June 30, 2001), pending Commission review of Ameritech Illinois' proposed permanent 13-801 compliance tariff in Docket 01-0614." Ameritech Init. Brief at 3-4. The tariff defined an EEL as "a new combination of unbundled local loop and unbundled dedicated transport, with the transport terminating in a CLEC's collocation arrangement." *Id.* at 4.

Globalcom first formally requested conversion of special access circuits to EELs on December 27, 2001. Amended Complaint at 9. The request concerned five of Globalcom's existing special access circuits. *Id.* Globalcom states that "[t]he purpose of requesting to convert only five circuits was to test Ameritech's systems and policies before submitting a large batch order." *Id.* On December 28, 2001, and again on January 7, 2002, Ameritech informed Globalcom that conversion of the subject circuits would trigger termination charges. *Id.* at 10. On February 6, 2002, Globalcom "reiterated to Ameritech that it was ready and willing to convert all of its special access circuits to EELs under the Interim [Compliance] tariff but for Ameritech's position that termination fees would apply." *Id.* at 11.

Globalcom first formally requested new EELs from Ameritech on December 19, 2001. *Id.* Thereafter, Globalcom asserts that "it was determined that Ameritech has a policy that all new EELs and conversions of month-to-month special access circuits must terminate at a CLEC collocation at an Ameritech facility." *Id.* Globalcom charges that the collocation requirement had no basis in state or federal law and that Ameritech used it "as a barrier to Globalcom's competitive entry in ordering EELs." Globalcom Init. Brief at 27. The Commission disapproved of the collocation requirement in Docket 01-0614[13]. On July 11, 2002, Ameritech replaced the Interim Compliance Tariff with its permanent 13-801 compliance tariffs[14], which contained no collocation requirement.

B. Violations Asserted

The Amended Complaint contains five separate counts, each of which charges violation of some subsection of Section 13-514 of the PUA. The following language applies to each such subsection:

> Prohibited Actions of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:

[13] Illinois Bell Teleuhone Company, Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, Order, June 11,2002, at 77.
[14] Ameritech Ex. 10.0

In Count I *of* the Amended Complaint, Globalcom alleges contravention of subsection (8) of Section **13-514,** which identifies the following as a per se violation of the section:

> violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of **1996** in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers;

According to Globalcom, Ameritech violated the ICA, and thereby offends subsection (8), by requiring collocation for all new EEL requests and the conversion of existing special access circuits, and by charging the early termination penalties described above for such conversions.

In Counts II and IV of the Amended Complaint, Globalcorn asserts contravention of subsection (10) of Section **13-514,** which prohibits the following as a perse violation:

> unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings;

Globalcom contends in Count II that Ameritech contravenes subsection **(I0),** by requiring collocation for all new EEL requests and for the conversion of existing special access circuits, and by charging an early termination penalty for such conversions. In Count IV, Globalcom objects to the same Ameritech actions and additionally complains that Ameritech refuses to provide new EELs unless: local traffic is not commingled with interstate traffic; the circuits meet the FCC's three-part test for the conversion of existing interstate special access service to EELs; and Globalcom transmits primarily voice traffic over the converted circuits.

In Count III of the Amended Complaint, Globalcom asserts contravention of subsection 13-514(11), which prohibits, as a per se wrong, "violating the obligations of Section **13-801**." Globalcom maintains that Ameritech violates the following subsections of Section **13-801:**

> **(d.)** Network elements. The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just,

> reasonable, and nondiscriminatory rates, terms, and conditions.
>
> [and]
>
> (g) Cost based rates. Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates. . .

Globalcom contends that Ameritech contravenes these subsections of Section 13-801 and, therefore, subsection 13-514(11), by requiring collocation for all new EEL requests and the conversion of existing special access circuits, by charging an early termination penalty for such conversions and by refusing to provide new EELs for data service.

In Count V of the Amended Complaint, Globalcom avers that Ameritech violates subsections (2) and (6) of Section 13-514, which bar the following per se wrongs:

> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;
>
> [and]
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.

In Globalcom's view, Ameritech offends the foregoing subsections by requiring collocation for all new EEL requests and the conversion of existing special access circuits, by charging an early termination penalty for such conversions, and by assessing a facilities assignment fee for converting each circuit from the federal to the state tariff. Additionally, Globalcom stresses that Section 13-514 is, by its express language, not limited to the per se enumerated violations and extends, as well, to "other actions which impede competition."

C. Requested Relief and Ameritech's Dismissal Motion

Globalcom's principal request is for relief from termination charges when converting existing special access circuits to EELs. More specifically, in the Amended Complaint, Globalcom seeks an order in which the Commission:

a.) finds that the imposition of termination penalties for the conversion of special access circuits to EELs is anticompetitive under the PUA;

b.) requires Ameritech to convert to EELs all special access circuits that Globalcom identifies, without charging an early termination penalty and without requiring collocation at an Ameritech facility (so long as Globalcom maintains EEL service on

each circuit for at least as long as the original special access term of service for that circuit);

c.) requires Ameritech to refund to 'Globalcom the difference between the actual charges paid by Globalcom since December 27, 2001 for each circuit that it has indicated to Ameritech that it wishes to convert to EELs and the amount those charges would have been if Ameritech had converted those circuits to EELs on that date;

d.) requires Ameritech to immediately provide new EELs without requiring that they: (1) be collocated; (2) be used for voice service; (3) do not commingle intrastate and interstate'traffic; and (4) meet the Federal Communications Commission's ("FCCs") "local use test";

e.) assesses penalties against Ameritech;

f.) directs Ameritech to pay Globalcom's attorneys fees and costs.

Ameritech's Motion challenged the Commission's power to shield Globalcom from the termination penalties in Ameritech's special access tariffs. The Motion was granted in part. The ALJ ruled that the Commission had no authority to direct Ameritech to disable the terms of its federal tariffs, but also ruled that Globalcom could proceed to evidentiary hearings with regard to the Illinois tariffs enforced by this Commission. Thus, requested relief (a), (b) and (c), above, were limited to the latter tariffs, but not dismissed. In its post-hearing briefs, Globalcom asks'the Commission or the ALJ to reverse the ALJ's ruling regarding Ameritech's federal tariffs and grant the requested relief with respect to all existing special access circuits identified by Globalcom.

The Motion also asserted that Globalcom failed to comply with the notice requirement of subsection 13-515(c) with regard to several of Globalcom's other claims. The ALJ's Ruling granted this portion of the Motion in part, dismissing Globalcom's request for immediate access to EELs without having to satisfy Ameritech's requirements concerning voice service, commingling and the local use test (requested relief (d)(2)(3) and (4) in the preceding paragraph). The ALJ ruled that Globalcom has not satisfied the 48-hour notice requirement in subsection 13-515(c) with respect to those issues.

Regarding the relief requested in (d)(1), above, Globalcom states that in view of "the fact that Ameritech's July 2002 compliance tariff has removed the collocation requirement for new EELs, it does not appear that Globalcom needs relief at this time." Globalcom Reply Brief at 47. Accordingly, the Commission need not resolve that issue in this Order (although the collocation requirement will need to be discussed insofar as it is implicated in Globalcom's objections to termination charges). As already noted, we definitively ruled in Docket 01-0614 that Ameritech's now-superseded collocation requirement for the termination of EELs has no basis in law.

D. Conversion & Termination Charges

Globalcom asserts two bases for barring imposition of termination charges upon conversion of Globalcom's leased special access circuits to EELs. First, Globalcom argues that the conversion from special access to EELs does not constitute a "termination," as that term is employed in Ameritech's special access tariffs and the parties' ICA. Globalcom Ex. 1.0 at **17.** Second, Globalcom contends that since 1999, when it began purchasing services from Ameritech, it has been obstructed by Ameritech's purportedly unlawful and anti-competitive policies and practices from obtaining EELs. As a result, Globalcom believes, fairness dictates that it be excused from paying termination penalties associated with services it would not have procured but for Ameritech's alleged intransigence. We will address these arguments in turn.

1. Conversion as termination

Globalcom maintains that conversion from special access to EELs is not a "termination" under Ameritech's special access tariffs[15]. Globalcom stresses that although the relevant tariffs provide for termination charges upon "'termination of service prior to the expiration term of the OPP,'" they contain no specific language defining conversion to EELs as a "termination of service." Globalcom Reply Brief at 9-10 (quoting FCC Tariff No. 2, section 7.4.10(c)). Further, Globalcom emphasizes, it has not proposed to terminate service prior to expiration of the OPP term, because it has offered to commit to the purchase of EELs for an equal or greater duration. Accordingly, although the parties' ICA contemplates the imposition of "applicable" termination charges upon conversion of special access to UNEs, Globalcom asserts that such charges are not "applicable" under the language of the tariff. Amended Complaint at 21. In Globalcom's view, the intention of the tariffs is to apply termination charges upon complete termination of telecommunications service. *Id.* at 22.

Globalcom maintains that the foregoing construction of the pertinent tariffs and the ICA is consistent with the actual characteristics of conversion. "[C]onversion will not change the status of the circuits…[it] is merely a billing change." ***Id.*** "In fact, a customer speaking on the telephone during the conversion would not be interrupted." Globalcom Reply Brief at 9.

[15] Because we affirm, below, the ALJ's conclusion that the Commission lacks authority to override Ameritech's FCC-approved interpretation of its interstate special access tariff, our analysis of this issue cannot produce a remedy that we can apply to that tariff (as distinguished from the parallel intrastate tariff). Also, we note – and dismiss - Ameritech's objection that the intrastate tariff was not specifically mentioned in Globalcom's statutorily required notice letter to Ameritech (Attachment " D to the Amended Complaint) prior to commencement of this proceeding. Ameritech PR at **28.** The federal and state tariffs, and Globalcom's claims regarding them, are substantively identical. Ameritech itself argues that they should be treated identically. ***Id.*** at 39. Thus, Globalcom's notice letter provided adequate notice of Globalcom's claims and, in fact, Ameritech mounted a comprehensive defense to those claims.

Furthermore, Globalcom points out, Ameritech's special access tariffs "provide several examples where the conversion of a special access circuit does not require the payment of an early termination penalty, as long as the duration of the contract remains the same or longer." Globalcom Ex. 1 at 18. Thus, a carrier can change circuit type, move a circuit (for which "there is considerable wiring necessary[16]") or change rate plans without termination penalty, providing the duration of service is not diminished. *Id.*

Ameritech responds that "[t]he fact that there may not be a physical change in the facility used to provide the service does not mean that there has been no termination of service" within the meaning of the applicable tariffs. Amer. Init. Brief at 22. Conversion to EELs means that Globalcom would be "no longer using special access service out of a special access service tariff. Rather, the carrier is purchasing a combination of unbundled network elements." *Id.*

Additionally, Ameritech emphasizes that the subject tariffs expressly address "'termination of service prior to the expiration date of the *OPP* term.'" *Id.* (emphasis added by Ameritech). The OPP term attaches specifically to the discounted purchase of special access. "Thus, if Globalcom were to convert a special access circuit to an EEL, which is priced at UNE rates, rather than special access rates applicable to service provided under an OPP plan, prior to the expiration of the OPP term, it would, by definition, be terminating "service prior to the expiration date of the OPP term." *Id.* Ameritech thus disagrees with Globalcom's position that "service" means general "telecommunications service" and asserts instead that it means only the specific special access service provided under the relevant tariffs.

Further, Ameritech contends that this Commission has already rejected the argument that the conversion of special access to EELs is not a termination. In Level 3 Communications, Inc.[17], the CLEC claimed, like Globalcom here, that because the carrier "will continue to make use of the circuit provided as an EEL, there is no 'termination of service' in the true sense of the word." Amer. Ill. Ex. 2.0 at 32 (quoting the Post Hearing Arbitration Brief of Level 3 Communications, LLC in Docket 02-0332). We concluded:

> The FCC and various state commissions have consistently held that the CLEC should remain responsible for termination fees. There is no reason at this time to take a fresh look at termination charges. We agree that if the FCC felt a fresh look was mandated or appropriate, it would have stated so in its UNE Remand".

Globalcom rejoins that it is now time for a "fresh look at termination charges because, in the two years since the Level 3 arbitration decision, Illinois telecommunications law has been revised, the United States Supreme Court has

[16] **Globalcorn** Reply Brief at 22.
[17] **Docket** 00-0332, Order, **Aug.** 30, 2000.
[18] *Id.* **at 24.**

affirmed FCC rules obliging ILECs to offer UNE combinations, other states have nullified termination penalties in connection with conversion of special access circuits,' Ameritech has "resisted" providing EELs, and "the conversion of special access to EELs in Illinois has been shockingly low."[19] Globalcom Reply Brief at 20. The Commission is willing to revisit this issue. Without necessarily agreeing with Globalcom's characterization of the foregoing events, the Commission does believe it advisable to consider the developments - particularly the promulgation of Seciton 13-801 of the PUA - that have affected the emerging competitive market in the two years since our Order in Level 3 Communications, Inc..

Initially, the Commission does not agree with Globalcom's claim that the "service" associated with termination charges in the relevant tariffs is telecommunications service in general. The service provided under those specific tariffs is special access service. The available OPP discounts in those tariffs are for special access service only. The termination charges are linked to those specific discounts for that specific service and are intended to reimpose the undiscounted or "list" price for that specific service in the event of early termination. Furthermore, Ameritech is adversely affected by the early termination of that specific service", irrespective of whether the customer terminates other specific services or telecommunications service generally. Additionally, by adopting Globalcom's rationale, the Commission would potentially undermine every termination charge for a discrete service imposed by other carriers (including **CLECs),** by suggesting that only total termination of telecommunications service triggers such charge.

What constitutes a "termination" under the relevant statutes is a separate question, however. The meaning of this term is not intuitively obvious when the' customer, like Globalcorn here, proposes to continue using and paying for the pertinent facilities. A brief discussion of the purpose of, and relationship between, term discounts and termination penalties would be instructive at this point. With a term discount, the service provider trades away greater short-run revenue and profit in return for the promise of a lesser but longer-run revenue and profit. A termination penalty either reinforces the promise (by discouraging the customer from taking the benefit, but not the responsibility, of a term commitment) or, upon termination, imposes the price associated with the shorter term actually completed by the customer. Thus, the termination charge is essentially a risk-avoidance mechanism, designed to either preserve a long-term revenue stream or establish a revenue minimum (with appropriate credit for lesser discounts actually earned by the customer) if the long-term stream is terminated prematurely.

When the customer discontinues the subject service, and does nothing more, the relationship between the parties with respect to that service is ended and the revenue stream is completely terminated. In that instance, a properly-calibrated termination

[19] According *to* Globalcorn, since Ameritech received its first conversion request from an Illinois CLEC in August, 2001, 464 special access circuits have been converted out of the 78,010 such Ameritech circuits in Illinois. Globalcorn **Ex.** 5.0 at 3.
[20] Ameritech **Ex.** 6.0 at 7.

charge clearly and appropriately serves its purpose, giving the provider the greater per-unit revenue associated with the actual shorter term of se'rvice (and leaving the provider with the risk that its capacity will go unused over the longer term to which the customer originally committed)".

But what if, as here, the customer concomitantly commits to the purchase of the same (from a functional standpoint) service under another tariff, using the same systems and facilities of the provider, over no less than the same term applicable to the terminated service? In that situation, the provider receives a revenue stream for the expected duration, while the customer enjoys a (presumably) lower price over the remaining term of service. What the provider loses in this scenario is the difference between the discount actually received by the customer for the service and the presumably lesser discount the provider would have allowed if it had taken into account the smaller total revenue stream it will now receive over the originally intended term", The termination charge in Ameritechs Illinois special access tariff exceeds this amount, because it assumes that the relationship between the parties with respect to the relevant service' has ended entirely and that Ameritech will receive no additional revenue over the intended term.

Put another way, the subject termination charge is not designed for the situation presented here, where the provider-customer relationship continues with respect to the pertinent functionality, albeit under what amounts to a greater discount than originally contemplated. The customer's continuing term commitment shields the provider from the risk of carrying unused facilities. The continuing revenue stream also insulates the provider against additional economic loss, because the forward-looking cost of service is accounted for through the TELRIC cost-determination methodology[23]. The mismatch between the termination penalty in Ameritech's special access tariffs and the loss that Ameritech would sustain from Globalcom's proposed conversion suggests that Globalcom's proposal is not a "termination" within the intended meaning of the tariff[24].

As noted above, though, Ameritech recommends that we focus on the reference to *"the OPP term"* in the pertinent clause in the tariff. In Ameritech's view, "OPP" refers only to the optional price plan *for* special access, so that, "by definition," the full clause must also refer only to the termination of special access. Ameritech Init. Brief at 22.

[21] In ASCENT v. Ameritech Illinois. Inc., Docket 00-0024, Order, Jan. 3, 2002, the Commission disapproved of termination charges that imposed a greater penalty on the customer, but we did not disapprove of termination charges in general. To the extent properly calibrated termination charges facilitate meaningful discounts, they enhance customer welfare.

[22] The provider has no compensable forward-looking loss in this scenario. We disapproved benefit-of-the-bargain termination penalties in ASCENT, ***supra.*** Ameritech's special access termination charges appropriately reflect the limitations discussed in ASCENT, by confining the customer's penalty to the return of unearned discounts, as defined in ASCENT.

[23] The Commission acknowledges, but rejects, Ameritech's continuing objection to our (and the FCC's) reliance on TELRIC. E.g. Ameritech Ex. 7.0. This proceeding is not an investigation of TELRIC and we have no present interest in abandoning that methodology.

[24] We note that the termination charges in the tariff for special access DSIs were introduced in 1987, long before conversion to EELs was contemplated. Ameritech Ex. 3.0 at 6. The history of subsequent revisions to the tariff is not in the record.

While we agree that the termination clause in the special access tariff refers to special access, the key question is still whether "termination" of service, by whatever name, has occurred. Indeed, the entire phrase - "prior to the expiration date of the OPP term" - is more reasonably construed as identifying *when* termination must occur to trigger penalties, not whether termination has occurred.

Globalcom cites two decisions by sister state commissions that similarly determined that the conversion of special access to EELs does not constitute a "termination" for the purpose of imposing penalties[25]. Both decisions were rendered in arbitration proceedings pertaining to interconnection agreements under Section 252 of the Federal Act. The Kentucky commission flatly concludes that "there is no 'termination'" under the pertinent special access tariff because "the UNE combination performs the same functions."[26] The Tennessee Commission (construing contract language) held that termination occurs only when the CLEC "fails to meet its volume and term commitments," and that "it is immaterial whether AT&T meets its commitment through the purchase of special access or UNEs."[27] Although neither decision set out the actual language interpreted by the respective commission, both decisions do assert the principle that a re-characterization of the same facilities from access circuits to combined elements is not a termination unless the original term commitment will be unfulfilled.

Additionally, when interpreting tariffs and other provisions under our supervision, this Commission ought to scrutinize such materials through the lens of our legislative mandate. In subsection 13-801(a), we are directed to require ILECs to provide network elements "to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings." With this sort of forceful legislative emphasis, we have no trouble concluding that it is time to move past Level 3 Communications, Inc. and, where reasonable in light of the pertinent tariff language, free fledgling competitors from the consequences of choices made when, as here, no choice (for new EELs) existed.

In this regard, Globalcom cites decisions by two other state commissions[28] that set aside, on policy grounds, termination penalties that the subject ILECs would have

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[25] In the Matter of: Petition by ATBT Communications of the South Central States, Inc. and TCG Ohio for Arbitration of certain terms and conditions of a proposed agreement with Bellsouth Telecommunications, Inc. pursuant to 47 U.S.C. Section 252, Kentucky Public Service Commission Case No. 2000-465, June 22, 2001; In Re: Petition for Arbitration of the Interconnection Aareement Between ATBT Communications of the South Central States, Inc.. TCG Midsouth. Inc.. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. 6252, Tennessee Regulatory Utility Commission Docket No. 00-00079, November 29,2001.

[26] *Id.,* KPSC Order of June 22, 2001, at **3.**

[27] *Id.*, TRUC Order of Nov. 29, 2001, at 8.

[28] In Re: Petition of ATBT Communications of the Southern States. Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Aqreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, South Carolina Public Service Commission Docket No. 2000-527-C; Order No. 2001-079, January 30, 2001; In Re Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions *of* Proposed Aareement with BellSouth Telecommunications, Inc. Under the Telecommunications Act

imposed on the conversion of special access to EELs. Those commissions stressed that the relevant special access circuits were purchased solely because UNE combinations were not offered at the relavent time. However, Ameritech counters with other citations to sister state commissions that uphold the ILEC's imposition of termination charges upon conversion[29]. The Florida commission opined that the ILEC is "duly entitled to 'penalize' AT&T or any party if their respective contract arrangements are breached."[30]

The Commission concludes that in the particular circumstances postulated in this proceeding – where the customer proposes to take a functionally identical service that uses the same systems and facilities as special access, over the same 'or longer duration as the customer's original commitment to 'special access – there is no termination within the meaning of Ameritechs intrastate special access tariff. We do so because new EELs were previously unavailable to Globalcom, because Ameritech's tariffs do not expressly define a conversion to EELs as a termination, because the termination penalties in those tariffs do not appropriately address the continuing purchase of the same facilities for the balance of the original term commitment, and because 13-801 compels a tariff interpretation that promotes competitive entry. While we generally agree with the Florida commission with regard to the importance of contractual arrangements, this Commission nevertheless assigns a higher priority to the foregoing factors.

To be clear, we do not intend, by this conclusion, to generally invalidate Ameritech's intrastate special access termination penalties. They will continue to apply to circumstances not described here. Moreover, we are not suggesting that Ameritech would be precluded from filing, for our consideration, a special access tariff that explicitly contemplates conversions to EELs and imposes a properly calculated termination charge (or alters its special access discounts to reflect the risk of conversion). The present special access tariff, however, does neither and we do not interpret it to treat the instant circumstances as a termination.

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of 1996, Docket 11853-U, March 6, 2001, and Order Clarifvina and Modifvinq Initial Order, Georgia Public Service Commission Docket 11853-U, July 3,2001. The Tennessee and Kentucky Commissions, in the orders cited above, also suggest that public policy considerations formed part of the bases for their respective decisions.

[29] ATBT Communications of the Southern States. Inc., Florida Public Service Commission Docket No. 000731-TPPSC-0101402-FOF-TP, PUR 4th, Slip Opinion, June 28, 2001; In the Matter of Investiaation into the Entry of Qwest Corporation, formeriv known as U S West Communications, Inc., into In-Reaion InterLATA Services Under Section 271 of the Telecommunications Act of 1996, Oregon Public Utilities Commission, UM 823, PUR 4th, Slip Op., 2001. Ameritech's discussion of the latter decision, while literally correct, is misleading. The commission held that "this [Section 271] proceeding is not the appropriate forum for seeking redress of alleged past improper behavior" and did not directly address the CLECs' argument that the past unavailability of combined UNEs justified waiver of termination charges. *Id.* at 14.

[30] ***Id.*** FPSC Order of June 28, 2001, at 33. Notably, based on the foregoing decisions, the termination charges of the same ILEC (BellSouth) can be imposed upon conversions in Florida, but not in Georgia, South Carolina, Kentucky or Tennessee.

The Commission further concludes that the subject termination penalties are not "applicable" termination charges, as that term appears in the parties' ICA. We do not agree with Ameritech that this renders the ICA provision "meaningless." Ameritech Init. Brief at 20. If a CLEC does not agree to complete the original term commitment for the subject facilities, the termination charge would apply. Similarly, if the CLEC proposed to cease leasing some special access circuits while converting others, termination charges could apply to the former, even if the CLEC agreed to complete the term commitment for the latter.

We note that it follows from the foregoing analysis that Ameritech cannot impose termination charges when a customer purchasing special access circuits under its FCC tariff elects to take such circuits under the parallel Illinois tariff instead[31]. In such cases, the customer is simply taking the exact same service under a substantively identical tariff filed with a different sovereign. Ameritech's revenue stream remains intact, both with respect to magnitude and duration. Therefore, in the Commission's view, there is no termination under the federal tariff, and Ameritech's insistence to the contrary is in derogation of that tariff. The parties have cited nothing in FCC or federal decisions or regulations, or in the Federal Act, that contradicts this conclusion. Federal authorities have simply never addressed whether conversion from the federal to the state special access tariff is a termination that triggers penalties. Therefore, the Commission is free to reach its own conclusion on this issue and, under Section 251(d)(3) of the Federal Act[32], free to consider the impact of Ameritech's derogation of its federal tariff on intrastate telecommunications. Our conclusion is that Ameritech's unwarranted interpretation of its tariff is unreasonable and has the effect of impeding intrastate competition within the meaning of subsections 13-514(6), (10) and (11) of the PUA.[33]

In its review petition, however, Ameritech contends that the foregoing conclusion is an assertion of state power over Ameritech's interstate tariff, in contradiction of our conclusion in Section III.F of this Order that interstate tariffs are under federal authority. Ameritech PR at 44. Ameritech misunderstands our analysis here. Our two-pronged conclusion is that Ameritech's interpretation of its interstate special access tariff, as

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[31] Ameritech indicates that it would do so, since it regards such jurisdictional change as a service termination. Answer, at 6; Amer. Ex. 3.0 at 17; Ameritech PR at 42.

[32] "In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 USC 252(d)(3).

[33] Ameritech characterizes this as a declaratory ruling on an issue not presented in the Amended Complaint. Ameritech PR at 42. However, Globalcorn avers that Ameritech did not disclose its intention to impose termination charges upon conversion from the federal special access tariff to the Illinois access tariff until it filed its Answer in this proceeding. Globalcom RPR at 29. Thereafter, the parties addressed the subject in testimony. E.g. Globalcorn Ex. 5 at 11; Ameritech Ex. 3 at 17. Because the parties thus had an opportunity to address this issue, and because the Commission agrees with Globalcom that this issue will "immediately be back before the Commission," Globalcom RPR at 30, we find it both fair and efficient to provide guidance to the parties and others now. Furthermore, all we are doing at this time is applying, to interstate/intrastate special access conversions, the principles and policies articulated in this Order with regard to conversions from special access to EELs.

articulated in this case, is both unwarranted and, in its effect, a violation of Illinois law. Therefore, to cure that state law violation, we could compel Ameritech to cease noncompliance with its federal tariff and to implement it in the manner we deem correct. However, if this Commission's interpretation of what constitutes a termination under Ameritech's FCC tariff were rejected by an appropriate federal body, we would be required, under the principles discussed in Section III.F, below, to defer to that authority. Putting it differently, to enforce Illinois law, we can require a carrier to come into compliance with its interstate tariff, so long as our interpretation of that constitutes compliance with that tariff has not been invalidated by the FCC or a federal court. Ameritech is free, of course, to seek such invalidation from federal authorities.

Since the Amended Complaint alleges violations of Section 13-514 of the PUA, this proceeding, unlike the Section 252 and 271 cases from other jurisdictions cited by the parties, requires a decision with respect to culpability. Ameritech argues, though, that even if the Commission rejects Ameritech's interpretation of its termination provisions (as we do above), it would be unfair and arbitrary to characterize Ameritech's interpretation as "unreasonable" within the meaning of Section 13-514. Ameritech PR at 31 et seq. Ameritech's position is that it was merely acting in accordance with our conclusion in Level 3 Communications. Inc. and with FCC decisions allowing termination penalties upon conversion of special access circuits. *Id.* At most, Ameritech avers, our limitations on termination penalties should only be applied prospectively. *Id.*

The Commission initially observes that we are applying our view of Ameritech's termination charges prospectively. In section H.1 of this Order, we require Ameritech only to cease and desist from imposing intrastate termination penalties on *future* conversion requests, so long as Globalcom agrees to honor the time commitment it made with respect to special access.

In section H.2, however, the Commission does require Ameritech to pay compensatory damages in connection with any intrastate special access circuits under lease to Globalcom after December 27, 2001 (the date of Globalcom's first conversion request). Nevertheless, we do not find that either FCC decisions or our Order in Level 3 Communications, Inc. make it unfair to impose retroactive penalties on Ameritech. The FCC decisions[34] that Ameritech cites as proof of the reasonableness of its position regarding termination penalties all dealt with FCC rules and federal tariffs. None addressed Illinois law or intrastate tariffs.

With regard to our Order in Level 3 Communications, Inc., Ameritech misconstrues and inappropriately expands upon our remarks. The three sentences from the Level 3 Communications. Inc. Order that we quote earlier in this Order (p. 10)

[34] E.g., the Verizon Pennsylvania 271 Order, FCC Dckt. 01-138, 16 FCC Rcd 17419, released Sept. 19, 2001, and the Verizon/Worldcom Arbitration Decision, CC Docket No. 00-218, 00-249 and 00-251, Memorandum Opinion and Order, DA 02-1731, released July 17, 2002.

are the sum total of what we said about termination penalties in that docket[35]. In the first sentence, we said that other state commissions "had consistently held" that CLECs must pay termination charges for conversions. As demonstrated by our review of several state commission orders issued during 2001, above, that is no longer true. In the second sentence, we stated that we perceived no reason "at this point" to look beyond what other commissions, principally the FCC, had already said about termination penalties. We thus declined to provide an Illinois-specific review of the issues, and only for the time being. In the third sentence, we opined that if *the FCC* believed a fresh look at termination charges were warranted, it would have said **so.** We were, again, referring to the FCC's view of FCC rules and saying nothing about intrastate conversions or policies. Moreover, the salient circumstance here – Globalcom's offer to lease EELs for the full duration of its special access commitment – was absent from Level 3 Communications, Inc..

Accordingly, the Level 3 Communications, Inc. Order and the FCC's decisions on termination charges neither establish that Ameritech's interpretation of its termination penalty provisions was reasonable nor preclude a retroactive penalty based on the conclusion that Ameritech's interpretation was unreasonable. It is worth emphasizing here that we are analyzing unreasonableness as a statutory construct, not as a colloquial term connoting senselessness. Ameritech's tariff interpretation is statutorily unreasonable – rather than utterly baseless - because it is not compelled by the intrastate tariff's language, purpose or history, yet impedes the development of competition that the PUA strongly mandates.

Therefore, the Commission concludes that Ameritech's intention to impose termination charges in response to Globalcom's proposed conversion of special access' to EELs contravenes subsection (6) of Section 13-514 ("unreasonably acting…in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers"). Ameritech's interpretation of its special access tariffs improperly increases Globalcom's competitive operating costs, thereby impairing Globalcom's ability to offer services.

We further conclude that Ameritech's intention to treat Globalcom's proposed conversion as a termination is contrary to subsection 13-514(8) ("violating the terms of…an ICA…in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers"). As we already stated, termination charges are not "applicable," within the meaning of the ICA, to conversions to EELs under the circumstances proposed by Globalcom. Ameritech's contract interpretation effectively confined Globalcom to more costly special access - a higher cost that had to be passed on to consumers or absorbed by Globalcom. Moreover, that additional cost drew down Globalcom's financial resources, impeding its ability to make telecommunications services available. We further hold that, in view of Ameritech's familiarity with the ICA, it acted knowingly.

[35] Indeed, termination penalties for conversions to EELs were merely a sub-part of one of the 37 issues submitted for arbitration in Level 3 Communications, Inc.

Ameritech contends, however, that the foregoing conclusion is "inconsistent with the history" of the parties' ICA. Ameritech PR at 41. Ameritech notes that another carrier originally presented the ICA to this Commission for arbitration, in Focal Communications Corporation of Illinois, Docket 00-0027 (after which Globalcom adopted the ICA, as it was permitted to do under federal law). In that proceeding, Ameritech asserts, the witnesses concurred that the ICA authorizes Ameritech to assess termination penalties "in precisely the same situation at issue here." Ameritech PR at 41. Ameritech is incorrect. The situation here is not the same. Globalcom has agreed to fulfill the term commitment it made for special access (but with the same facilities billed as EELs). Had Globalcom not done so, termination penalties would apply, just as the witnesses in the Focal proceeding presumed. Thus, our ruling is consistent with the "history" of the ICA.

We also conclude that Ameritech violates subsection 13-514(11) ("violating the obligations of Section 13-801") by failing to provide access to EELs on just and reasonable terms, as required by subsection 13-801(d). In view *of* our discussion above, the Commission regards imposition *of* termination charges under the described circumstances as an unjust and unreasonable barrier to EELs. We also find that Ameritech's intention to impose termination charges obstructs the Legislature's mandate in subsection 13-801(a) that the Commission "shall require the [ILEC] to provide...network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings."

Ameritech claims that Section 13-801 does not authorize the Commission to determine Ameritech's duties and limitations with respect to the conversion of intrastate special access circuits to EELs because, in Ameritech's view, subsection 13-801(j)[36] expressly negates such authority. Ameritech Init. Brief at 53. However, subsection 13-801(j) has nothing to do with termination penalties. It merely maintains the status quo with respect to the Commission's power to *require or prohibit* the substitution (i.e., conversion) of EELs for special access. Therefore, even if Ameritech were correct that subsection 13-801(j) limited our power under other subsections of Section 13-801 to *require* such conversions (which we need not decide here[37]), it does not affect our authority, under Section 13-801 or any other statute, to regulate the terms and conditions of conversions already authorized by other sources. In this instance, conversions are expressly authorized by both Ameritech's tariffs and the parties' ICA. We are simply interpreting the duties created by those documents, and doing so in light of, among other things, subsections 13-801(a) and (d). Subsection (j) does not, as Ameritech suggests, remove such conversions from Commission supervision.

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[36] "[N]othing in this amendatory Act of the 92nd General Assembly is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area." 220 ILCS 5/13-801(j).

[37] We did explicitly declare that we "again assert our jurisdiction over the issue", in Illinois Bell Telephone Company. Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order, June 11, 2002, at 74. However, we did not identify our source of authority for that declaration.

Finally, Ameritech raises the concern that by disabling termination charges under the intrastate tariff, but not under the interstate tariff, the Commission is creating an incentive for "tariff arbitrage." Ameritech PR at 39. More specifically, Ameritech cautions that carriers might under-report their percentage of interstate traffic in order to obtain special access under the Illinois tariff. The Commission rejects the notion, for which there is no supporting evidence, that carriers will fabricate their usage reports in the manner suggested. Moreover, that would be fraud, not arbitrage.

2. Fairness & Termination Charges

Globalcom's complaint is based on a narrative of events extending over several years. According to Globalcom, both the FCC and this Commission held in 1996 that ILECs were required to provide UNEs (including EELs) to requesting CLECs. However, in 1999, when Globalcom began purchasing UNEs from Ameritech, it could not procure EELs because Ameritech, in ostensible contravention of state and federal law, did not offer them. In 2001, when Ameritech finally offered EELs, it required collocation and declared that the early termination penalties associated with special access circuits would be imposed. Accordingly, Globalcom insists that it could not economically order EELs – first, because of termination charges and, second, because it could not afford to collocate.

As already noted, the collocation requirement was disapproved by the Commission in July, 2002, but before Globalcorn can purchase new EELs it must perform network reconfiguration to pass the FCC's commingling prohibition with respect to interexchange and local traffic and facilities. However, Globalcom maintains it would not have commingled originally if it could have purchased EELs when it configured its network in 1999. It claims it will undertake the cost and effort to reconfigure its network now, but only if termination charges are waived or prohibited.

The questions presented, therefore, are whether Ameritech had a clear duty to provide new EELs, whether (and when) it failed to comply with that duty, and whether law and fairness require the Commission relieve Globalcorn of the downstream consequences of such failure. The Commission will address these issues in the following subsections of this Order. We will discuss Illinois and federal regulatory actions separately, then present a combined chronology, so that the complete regulatory framework governing Ameritech's obligation with regard to combined UNEs will be clearly delineated.

a) Ameritech's legal obligations

1) Illinois regulatory actions

Globalcom contends that this Commission first directed Ameritech to combine UNEs, including EELs, for CLECs on June 26, 1996 in the LDDS Order[38]. Globalcom Init. Brief at 1-2. Globalcom stresses the Commission's conclusion in that Order that subsection 251(c)(3) of the Federal Act "'requires any and all network elements to be made available, *in* any combination, so that a new entrant can provide *service,* and that necessarily includes the provision of those network elements on a "total network or platform basis'." *Id.*, quoting the LDDS Order at 64 (emphasis added by Globalcom). Regarding Illinois law, we stated that the ILECs' obligation to furnish "total network elements arose from Section 13-505.5 of the PUA[39]. LDDS Order at 64. In Globalcom's view, the LDDS Order required ILECs to offer new combinations of UNEs, including EELs, and to perform the work of combining them if requested by a CLEC. Globalcom Init. Brief at 1-2.

Globalcom asserts that its expansive interpretation of the LDDS Order was confirmed by the Commission's subsequent (February, 1998) determinations in the TELRIC Order[40]. Globalcom Init. Brief at 5. In that proceeding, we stated:

> The Commission rejects Ameritech Illinois' critique of end-to-end network element bundling. As stated in [the LDDS Order], the offering of end-to-end bundling is consistent with the requirements of the 1996 Act. The Commission also agrees with Staff that there are significant benefits to the availability of end-to-end network element building as a means *of* provisioning local service.

TELRIC Order at 124.

Ameritech counters that the LDDS Order did not direct Ameritech to combine elements for CLECs. Ameritech Init. Brief at 32-33. Rather, Ameritech avers, that

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[38] ATBT Communications of Illinois. Inc. Petition for a total local exchanae wholesale service tariff from Illinois Bell TeleDhone Company d/b/a Ameritech Illinois and Central TeleDhone Company pursuant to Section 13-505.5 of the Illinois Public Utilities Act.: LDDS Communications. Inc. d/b/a LDDS Metromedia Communications Petition for a total wholesale network service tariff from Illinois Bell TeleDhone Company d/b/a Ameritech Illinois and Central Telephone Company pursuant to Section 13-505.5 of the Illinois Public Utilities Act, Dockets 95-0458 & 95-0531 consol., Order June 26, 1996.

[39] "Any party may petition the Commission to request the provision of a noncompetitive service not currently provided by a local exchange carrier within its service territory." 220 ILCS 5/13-5055

[40] Investigation into forward looking cost studies and rates of Ameritech Illinois for inter: connection, network elements, transoort and termination of traffic. Illinois Bell Telephone Company, ProDosed rates, terms and conditions for unbundled network elements, Docket No's. 96-0486/96-0569 consol., 2nd Interim Order, Feb. 17, 1998.

Order merely required Ameritech to make three separate network elements (loop, local switch platform and interoffice transport) available in a manner enabling the CLEC to combine those elements itself in order to provide end-to-end service. Ameritech Reply Brief at 4 (emphasis added). Thus, Ameritech stresses, the LDDS Order did not direct Ameritech "to file a tariff for the provision of 'new combinations' of any type." Id. Additionally, Ameritech notes that EELs differ from the UNE combination in the LDDS Order because they do "not include a local switch." *Id.*

Further, Ameritech argues that its more limited interpretation of the LDDS Order was confirmed by our later (May, 1998) conclusions in the "GTE Order."[41] In that case, with respect to whether the LDDS Order required the ILEC to provide combinations, the Commission said:

> ...a close reading of the Commission's conclusion . . . indicates that this was a decision that required unbundling by the LEC and allowed rebundling by the competing carrier. It did not require provision of LEC combinations priced upon the cost of the underlying network elements. Therefore, not' ordering GTE to provide such combinations is not inconsistent with our LDDS platform decision on the Ameritech wholesale [LDDS] docket.
>
> For these reasons we do not order GTE to provide combinations of network elements at unbundled network element prices pursuant to state law.

GTE Order, at 8, quoted in Ameritech Init. Brief at 34. Ameritech emphasizes that the GTE Order was issued three months after the TELRIC Order cited by Globalcom. Ameritech Init. Brief at 35. Moreover, Ameritech avers, the TELRIC Order contains "absolutely no language.,.about a new combinations requirement." Ameritech Reply Brief at 5.

Ameritech additionally cites our March, 2001 decision in Illinois Bell Telephone[42], where we declared that because of certain rulings by the United States Court of Appeals (discussed below), Ameritech "cannot be required to provide new combinations of network elements." ***Id.*** at 52, quoted in Ameritech Reply Brief at 6[43]. In Ameritech's judgment, the foregoing line of decisions demonstrates the reasonableness of Ameritech's belief that any requirement to provide EELs took root only recently.

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[41] Investigation into GTE North Incorporated's and GTE South Incorporated's TELRIC Cost Studies and Establish Rates for Interconnection. Unbundled Network Elements, ant Transport and Termination of Traffic, Docket 96-0503, Order, May 19, 1998.

[42] Illinois Bell Telephone Company. Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, Docket 00-0393, Order Mar. 14,2001.

[43] As Ameritech acknowledges, we deleted the portions of the Order quoted by Ameritech in an Amendatory Order dated May 1, 2001 ("the Commission has concluded that a portion of the Order requires modification because it is unnecessary to the conclusion ultimately reached and would seem to prejudge matters that are currently before the Commission in another docket").

However, Globalcom points to the October, 2001 "TELRIC Compliance Order"[44], where we said that the TELRIC Order "expressly requires Ameritech to provide network element combinations."[45] We also declared in the TELRIC Compliance Order that:

> ... we have the legal authority to order Ameritech to provide combinations of unbundled network elements ordinarily combined in Ameritech's network, and... public policy not only supports, but commands, that we, require Ameritech to provide such combinations if we are to promote mass market competition for residential and small business customers in Illinois. We therefore require Ameritech to provide to CLECs combinations of unbundled network elements that Ameritech ordinarily combines for its own use or for the use of its end user customers, including the unbundled network element Platform and Enhanced Extended Links, *or EELs*.

Id. at 93 (emphasis added by Globalcom, at Globalcorn Init. Brief at 7).

Additionally, the Commission observed in the TELRIC Comuliance Order that we had "rejected Ameritech's arguments in the TELRIC proceedings and the [LDDS] proceeding that it shouldn't be required to provide unrestricted end-to-end bundling." Id. at 86-87. Similarly, we noted that "*years ago* we ,ordered Ameritech to provide unrestricted end-to-end unbundling pursuant to Section 13-505.5 of the [PUA]." Id. at 94 (emphasis added), quoted in Globalcom Init. Brief at 7. Thus, according to Globalcom, the TELRIC Compliance Order reflects our view that Ameritech's duty to provide UNE combinations, including EELs, extends back through the TELRIC Order to the June, 1996 LDDS Order.

In addition to Section 13-505.5, our conclusions in the TELRIC Comuliance Order were expressly based on Section 9-250 of the PUA ("Ameritech's attempt to impose restrictions on the availability of the UNE-Platform is unjust and unreasonable under Section 9-250"), and on the then-recently enacted subsection 13-801(d)(3) of the PUA[46], which took effect on June 30,2001.

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[44] Investiaation into the Compliance of Illinois Bell Teleohone Company with the Order in Docket 96-0486/0569 Consolidated Reaardina the Filina of Tariffs and the Accompanvina Cost Studies for Interconnection, Unbundled Network Elements and Local Transport and Termination and Reaardina End to End Bundling Issues, Docket 98-0396, Order, Oct. 16, 2001.

[45] *Id.* at 94.

[46] "Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act." 220 ILCS 5/13-801(d)(3).

Ameritech replies that the TELRIC Compliance Order did "not" hold that Ameritech Illinois had already been ordered to provide new UNE combinations, including EELs." Ameritech Reply Brief at 7 (emphasis in original). Rather, Ameritech maintains, that Order merely required Ameritech "to file a combination tariff consistent with the Order's findings to be effective on a prospective basis." Id. (emphasis added). In Ameritech's view, this interpretation is consistent with the fact that the TELRIC Compliance Order is based, in part, on then-new subsection 13-801(d)(3).

2) Federal Regulatory Actions

In March, 1996, the Federal Act added provisions to the federal Communications Act. For our purposes here, the principal addition was subsection 251(c)(3), which assigns ILECs the duty:

> … to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service[47].

In August, 1996, the FCC released its First Report and Order[48], which articulated policies and established rules implementing Sections 251 and 252 of the Federal Act. The FCC announced that:

> …section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated. We also conclude that the quoted text requires incumbent *LECs,* if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner….

Id., para. 293 (emphasis added). The FCC additionally concluded that:

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[47] 47 USC 251(c)(3).

[48] In re Implementation of Local Competition in Telecommunications Act of 1996, FCC 96-325, CC Dckt. No's 96-98 and 95-185, 11 FCC Rcd 15499 (rel. Aug. 8, 1996).

> The phrase [in subsection 251(c)(3)] "allows requesting carriers to combine them," does not impose the obligation of physically combining elements exclusively *on* the requesting carriers. Rather, it permits a requesting carrier to combine the elements if the carrier is reasonably able to do so. If the carrier is unable *to* combine the elements, the incumbent must *do* so.

Id., para. 294 (emphasis added).

The FCC codified the conclusions of the First Report and Order in administrative rules promulgated in August, 1996. FCC Rule 315[49] provides:

> (a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.
>
> (b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.
>
> (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:
>
> > (1) technically feasible; and
> > **(2)** would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.
>
> (d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.
>
> (e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible

[49] 47 CFR **51.315**

> (f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

In July, ***1997,*** subsections (b) through (f) of FCC Rule 315 were vacated by The United States Court of Appeals in "IUB 1"[50]. The court held that subsection 251(c)(3) does not permit a new entrant to purchase the ILEC's assembled platforms of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. On January 25, 1999, the United States Supreme Court reversed the 8th Circuit's decision with respect to subsection (b) of FCC Rule 315, which it called "entirely rational," without addressing subsections (c)-(f)[51].

On November **5,** 1999, the FCC released the UNE Remand Order. There, the FCC said that "loop and dedicated transport are separate unbundled elements," while the EEL, as a combination of those separate elements, was not a separate UNE itself[52]. Moreover, the, FCC refrained from "interpret[ing] rule 51.315(b) as requiring incumbents to combine [UNEs] that are 'ordinarily combined'."[53] In contrast to its treatment of uncombined elements, including the elements comprising EELs, the FCC stated, with regard to existing loop-and-transport combinations:

> ...in specific circumstances, the, incumbent is presently obligated to provide access to the EEL. In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices.

Id., para. 480. The FCC derived the foregoing conclusions from its reinstated Rule 315(b) and from the duty to provide "nondiscriminatory access" in subsection 251(c)(3). *Id.*, para's 480-81 & 486. On November 24, 1999, the FCC added clarification regarding the "specific circumstances" under which the ILEC must allow conversion of special access to EELs in the Supplemental Order[54] (and further refinement in the Supplemental Order Clarification on June 2, 2000[55]).

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[50] Iowa Utilities Board v. F.C.C., 120 F.3d 753 (8th Cir. 1997).
[51] AT&T Corp., et al., Petitioners v. Iowa Utilities Board, et al., 525 U. S. 366, 395 (1999)
[52] UNE Remand Order, para. 480.
[53] *Id.*
[54] In the Matter of Imolementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-370, released November **24,** 1999.
[55] In the Matter of Imolementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183, released June 2, 2000.

As evidence that it was not acting anti-competitively with respect to EELs during this time period, Ameritech asserts that it fully complied with the FCC's UNE Remand Order and supplemental orders with respect to the conversion of existing 'special access to EELs. Ameritech Init. Brief at 40. "In March 2000, the Company posted guidelines and instructions for CLECs to follow in ordering conversions. Ameritech Illinois also took steps to create a generic contract amendment for easy insertion into its CLEC customers' interconnection agreements." *Id.* Globalcom counters that Ameritech in fact took several steps to make conversion exceptionally difficult. Globalcom Init. Brief at 19-22.

On March 2, 2000, in MCI Telecommunications Cora. v. US West Communications[56], the U.S. Court of Appeals for the Ninth Circuit questioned the scope of the Eighth Circuit's determination in IUB 1 that subsection 251(c)(3) establishes no ILEC duty to combine UNEs for requesting CLECs. The Ninth Circuit said that IUB 1 established, at most, only that the Federal Act "does not currently *mandate* a provision requiring combination." *Id.* at 1268 (emphasis added). Accordingly, the Ninth Circuit's said it was free to determine "whether such a provision 'meets the requirements' of the Act, i.e., to decide whether a provision requiring combination violates the Act." *Id.* The Ninth Circuit found it "absolutely clear" that a combination requirement does not contravene the Federal Act. *Id.* Similarly, on August 21, 2000, the Fifth Circuit of the U.S. Court of Appeals held, in Southwestern Bell Telephone Company v. Waller Creek Communications, Inc.[57], that a provision requiring an ILEC to combine UNEs was not "illegal," because "[n]othing in the Telecommunications Act forbids such combinations." *Id.* at 821. Despite this conflict among circuit courts, the Eighth Circuit retained control over FCC Rule 315 pursuant to federal procedure[58].

On July 18, 2000, on remand from the Supreme Court, the Eighth Circuit chose to reaffirm its previous invalidation of subsections 315(c)-(f), saying, "Congress [in subsection 251(3)(c)] has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "'combine such elements.'"[59]

On May 13, 2002, the U.S. Supreme Court, in Verizon v. FCC, reversed the Eighth Circuit with regard to subsections (c)-(f) of FCC Rule 315[60]. The court read "the language of 251(c)(3) as leaving open who should do the work of combination [of UNEs], and ...[citation omitted], that leaves the FCC's rules intact unless the [ILECs] can show them to be unreasonable." *Id.* The court determined that the ILECs had not done so, and that, instead, "the additional combination rules reflect a reasonable reading of the statute, meant to remove practical barriers to competitive entry into the local-exchange markets...." *Id.*

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[56] 204 F.3d 1262 (9th Cir 2000).
[57] 221 F. 3d 812 (5" Cir 2000).
[58] 28 USC 2342 ("Hobbs Act").
[59] Iowa Utilities Board v. F.C.C., 219 F.3d 744, 759 (8th Cir. 2000) ("IUB 3").
[60] Verizon Communications, Inc., et al. v. Federal Communications Commission et al., _ U.S. _, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002).

The result of the foregoing federal regulatory actions and decisions is that subsection 315(b) was inoperative from July, 1997 until January! 1999, while subsections 315(c)-(f) were inoperative from July, 1997 until May, 2002. Thus, in March, 2001, when we said in a later-deleted portion of the Illinois Bell Teleohone Order that Ameritech could not be required to provide new combinations of network elements, subsection (b) of Rule 315 was in effect and subsections (c)-(f) were not. That was still the case in October, 2001, when we issued the TELRIC Compliance Order, in which we held that "FCC Rule 315(b) compels the conclusion that Ameritech is currently obligated to combine unbundled network elements that it ordinarily combines in its network, even if the particular physical components of the network elements are not currently physically combined or connected." TELRIC Compliance Order at 94. Our rationale was that "Rule 315(b) encompasses combinations actually combined and ordinarily combined in Ameritech's network, and that Rules 315 (c)-(f), now vacated, encompass those network elements not ordinarily combined by Ameritech." *Id.*

3) Combined Chronology and Duty to Provide EELs

From the state and federal regulatory actions and decisions described above, the Commission can establish a chronology from which conclusions can be derived regarding the emergence and durability of Ameritech's obligation to provide combined UNEs, and particularly new EELs, to requesting CLECs. We do this for the limited purpose of determining whether Ameritech evaded a clear and sustained mandate to furnish new EELs to competitors. We make that determination for the limited purpose of discerning whether Ameritech has acted anti-competitively, which, in turn, would justify a remedial order preventing Ameritech from imposing termination charges when Globalcom converts special access circuits purchased under Illinois tariffs when EELs were unavailable.

> In March, 1996, subsection 251(c)(3) of the then-new Federal Act did not expressly assign ILECs the responsibility to combining UNEs. The Commission agrees with the Supreme Court's subsequent assessment in Verizon v. FCC that the statute "left open" that issue.
>
> In June, 1996, in the LDDS Order, the Commission explicitly required Ameritech to provide end-to-end bundling of UNEs, and to supply UNEs "in any combination," based on our reading of both subsection 251(c)(3) of the Federal Act and Section 13-505.5 of the PUA. We did not directly address Ameritech's responsibility to perform the work of combining the elements constituting EELs, although that could be fairly inferred from the requirement to provide "any combination."
>
> In August, 1996, in the First Order and Report, the FCC construed subsection 251(c)(3) to require ILECs to combine UNEs when requesting CLECs could not perform such combinations themselves. FCC Rule 315 codified that construction of the statute. Thus, at that time, Ameritech was

clearly required to furnish combined UNEs, such as EELs, as a matter of federal law and policy.

In July, 1997, the FCC's interpretation of subsection 251(c)(3) was disapproved and subsections (b)-(f) of FCC Rule 315 were invalidated by the Eighth Circuit. Therefore, at that time, Ameritech's duty to combine UNEs for requesting CLECs under the Federal Act was terminated.

In February, 1998, in the TELRIC Order, we reiterated our conclusion in the LDDS Order that the ILECs are obligated to provide end-to-end bundling of UNEs to requesting CLECs. We did not address anew, or explain anything previously said about, an ILEC's responsibility for doing the work of combining UNEs.

In May, 1998, in the GTE Order, the Commission agreed with the Eighth Circuit that subsection 251(c)(3) does not require ILECs to furnish UNE combinations. We also stated that the LDDS Order had not imposed that requirement under state law. Additionally, in the GTE Order we "specifically reserve[d] the question whether we would order the provision of a specific combination if it were requested as a new noncompetitive service under section 13-505.5 of the [PUA]." GTE Order at 8. Accordingly, as of that time, this Commission's view of an ILECs duty to combine UNEs, under either state or federal law, was either that no such duty existed or, from the perspective most favorable to Globalcom, that such duty was in doubt.

In January, 1999, the U.S. Supreme Court re-activated FCC Rule 315(b), thereby affirming the FCC's view of subsection 251(c)(3) insofar as the rule was derived from that statute. Subsection 315(b) addresses the duty to leave combined UNEs intact, not the duty to combine UNEs.

In November, 1999, in the UNE Remand Order and Supplemental Order, the FCC confirmed that subsection 251(c)(3) and FCC rules authorized CLECs to convert existing special access circuits to EELs under certain circumstances. Ameritech clearly understood this, as it established procedures for conversion. The FCC did not require the ILECs to provide new EELs, however.

On March 2, 2000, the Ninth Circuit of the U.S. Court of Appeals ruled that a combination requirement for ILECs was permitted, if not required, under subsection 251(c)(3) of the Federal Act, thereby casting doubt on the Eighth Circuit's contrary conclusion in IUB 1. However, the Eighth Circuit's view continued to bind the FCC and disable subsections (c)-(f) of FCC Rule 315.

On July 18, 2000, the Eighth Circuit in IUB 3, reiterated its conclusion that subsections (c)-(f) of FCC Rule 315 were' inconsistent with subsection 251(c)(3) of the Federal Act.

On March 14, 2001, in a portion of the Illinois Bell Telephone Order that the Commission later deleted as unnecessary to the resolution of the line-splitting issue in that proceeding, we expressly stated that Ameritech could not be compelled to provide new UNE combinations. We specifically refused to align the Commission with the federal courts, such as the Ninth Circuit, that contradicted the Eighth Circuit.

On June 30, 2001, Section 13-801 of the PUA took effect. Subsection 13-801(d)(3) explicitly directed the ILECs to "combine any sequence of unbundled network elements that it normally combines for itself." With specific regard to existing special' access circuits, however, Section 13-801 neither altered prevailing law nor the Commission's authority.

On October 16, 2001, in the TELRIC Compliance Order, the Commission noted that Ameritech ordinarily combines, for its own use and the use of its customers, the elements that make up an EEL, That fact, we said, brought EELs within the ambit of FCC Rule 315(b), which prohibits separation of combined elements by the ILECs., At the same time, we took EELs out of the purview of FCC Rules 315(c)-(f) (which were still vacated at that time) by concluding that those rules "encompass those network elements not ordinarily combined by Ameritech." TELRIC Compliance Order at 94. Accordingly, we were able to hold that "Ameritech is currently obligated to combine unbundled network elements that it ordinarily combines in its network, even if the particular physical components of the network elements are not currently physically combined or connected." *Id.* (emphasis in original). In effect, we confirmed that Ameritech was obligated, under federal law, to both convert existing circuits and furnish new EELs upon CLEC request.

Additionally, the Commission concluded in the TELRIC Compliance Order that, even apart from FCC Rule 315(b), we have authority under both federal and state law to impose UNE combination requirements on Ameritech, notwithstanding the contrary opinions of the Eighth Circuit.

> ...the Eighth Circuit's interpretation of the Act is not controlling upon us, and we agree with the Ninth and Fifth Circuits and the various federal district courts addressing the issue that we have the authority, consistent with the federal Act, to require Ameritech to provide combinations of network elements that it ordinarily combines in its network, and we hereby exercise our authority to do so.

> *Id.* at 94. Regarding state law, we cited Section 13-801, recalled our reliance on Section 13-505.5 in the LDDS Order, and added that Section 9-250 also precluded Ameritech from "imposing restrictions" on the availability of the UNE-Platform. *Id.*
>
> On May 13, 2002, in Verizon v. FCC, the Eighth Circuit's disapproval of FCC Rules 315(c)-(f) was reversed by the U.S. Supreme Court, which concluded that rules requiring UNE combinations were reasonable under, but not compelled by, subsection 251(c)(3).

Initially, in drawing conclusions from the foregoing chronology, the Commission does not agree with Globalcom that we can simply link the Supreme Court's decision in Verizon v. FCC back to the LDDS Order, as if those decisions formed an unambiguous and unbroken line of regulatory pronouncements regarding the ILECs' duty to furnish UNE combinations. We cannot ignore intervening regulatory actions, at both the state and federal levels. In the federal realm, the Eighth Circuit clouded the issue with respect to the Federal Act, while our own decisions initially contained inconsistencies regarding state obligations. The meaning of the LDDS Order, both at the time of issuance and in the retrospective lens of the GTE Order, was not unambiguous with regard to the ILEC duty to combine UNEs.

For the purpose of resolving the instant dispute, the Commission concludes that, under Illinois law, Ameritech's obligation to combine UNEs, including new EELs, became unambiguous on June 30, 2001, the effective date of Section 13-801 of the PUA. In February, 1998, we did declare in the TELRIC Order that, based on the LDDS Order, Ameritech had a duty to furnish end-to-end UNEs. However, in May, 1998, the GTE Order states that the LDDS Order did not establish a duty to under state or federal law to supply combined UNEs (a different subset of UNEs than end-to-end UNEs). Almost three years later, in March, 2001, in Illinois Bell Telephone, we again initially announced that Ameritech could not be required to provide combined UNEs. It was not until the TELRIC Compliance Order in October, 2001, three months after Section 13-801 took effect, that this Commission unequivocally established an ILEC duty to combine UNEs. It follows that Ameritech did not act in bad faith by ignoring a clear legal duty under Illinois law before June 30, 2001. (We will discuss Ameritech's conduct after that date, and the ramifications of that conduct, in the next subsection of this Order.)

Under federal law (insofar as it is applicable to state tariffs), in the First Report and Order in August, 1996, the FCC clearly declared that the Federal Act obliged ILECs to provide UNE combinations, and to do the combining when a CLEC could not do that for itself. Those principles were also included in FCC Rule 315. However, the Eighth Circuit vacated the relevant subsections of Rule 315 approximately a year later, and the Supreme Court did not revive the subsections pertaining to new combinations until May, 2002. The Ninth and Fifth Circuits disagreed with the Eighth Circuit in, respectively, March and August of 2000, but those disagreements created ambiguity, not clarity, regarding federal law.

Accordingly, the Commission cannot, for purposes of resolving this dispute, hold that Ameritech acted in bad faith under federal law by not offering new EELs before Rule 315 was fully reinstated by the U.S. Supreme Court in May, 2002, by which time Ameritech was offering new EELs under an intrastate tariff (albeit with the collocation requirement discussed in the next section of this Order).[61] The question is not whether Ameritech acted in its self-interest, litigated stubbornly or interpreted rules narrowly. Rather, the question is whether fundamental fairness justifies selectively disabling or waiving an otherwise valid tariff provision (i.e., early termination charges) due to the unreasonable conduct or bad faith of the party seeking to enforce the tariff. The rulings of the Eighth Circuit preclude the necessary finding of bad faith under federal law.

4) After June 30,2001 – the Collocation Requirement

Given our conclusion that Ameritech became obligated under state law to provide new EELs to requesting CLECs on June 30, 2001, the question becomes whether Ameritech complied with that duty. If it did so, the Commission cannot find that Ameritech acted anti-competitively and, as a result, cannot award damages or disable Ameritech's early termination penalties upon conversion of Globalcom special access circuits to EELs. On the other hand, if Ameritech did not comply with that duty, and if such non-compliance constitutes anti-competitive behavior under Section 13-514 of the PUA, then the Commission can take remedial action commensurate with the violation of that statute.

Globalcom's principal contention is that Ameritech unreasonably included a collocation requirement in its Interim Compliance Tariff[62], effective September 18, 2001, to discourage CLECs from purchasing new EELs[63]. Globalcom stresses that collocation is not required under either state or federal law. Moreover, Globalcom avers, collocation is both technically unnecessary for its business plan and prohibitively expensive for a small CLEC. Globalcom estimates its collocation cost at no less than $500,000. Globalcom Ex. 2 at 4-5 & 7. Because of the collocation requirement, Globalcom claims it could not rationally and affordably procure new EELs from the

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[61] To be completely clear, this conclusion pertains only to *new* **EELs.** Without making a finding with regard to the *conversion of existing circuits* to EELs, the Commission notes Ameritech's view that: "Globalcom's right to convert special access circuits (either intrastate or interstate) emanates from the FCCs UNE Remand Order, as modified and clarified in the Supplemental Order and Supplemental Order Clarification." Ameritech Init. Brief at 17.

[62] "The unbundled dedicated transport facility will extend from telecommunications carrier's customer's companies serving wire center to the telecommunications carrier's collocation cage in a different company central office in the same LATA. Telecommunications carriers must order the unbundled dedicated transport facility, with any necessary multiplexing from the telecommunications carrier's collocation cage to the wire center serving the telecommunications carrier's end user customer." Interim Compliance Tariff, quoted in Ameritech Init. Brief at 46.

[63] Ameritech contends that Globalcom did not provide proper notice, under Section 13-515 of the PUA, of its claim against Ameritech's inclusion of a collocation requirement in the Interim Compliance Tariff. Ameritech PR at 25. Globalcom's statutory notice letter (Attachment D to the Amended Complaint) clearly refutes this contention.

Interim Compliance Tariff. E.g. Globalcom Ex. 1.0 at 13. Instead, it purchased more costly special access circuits.

Initially, Ameritech asserts that "[a]s the Commission has recognized, a telecommunications carrier's enforcement of the terms and conditions of its effective tariffs cannot constitute grounds for a complaint under Sections 13-514 and 13-515 of the Act." Ameritech Init. Brief at 46, citing Rhythms Links, Inc. v. Illinois Bell Telephone Company, Docket 99-0465, Order, Dec. 2, 1999. Ameritech mischaracterizes our Order in Rhythms Links. In that proceeding, the complainant sought revisions of Ameritech's collocation tariff that would comport with complainant's view of an FCC order., We held that "changes to the terms and conditions of a tariff can be reviewed only in the context of a Section 9-201 or 9-250 proceeding." *Id.* at 13. In this case, Globalcom has not requested tariff revision. It did ask, *inter* alia, that the collocation requirement be deemed inapplicable to Globalcom, but after the Amended Complant was filed, the Interim Compliance Tariff that contained the subject collocation requirement was superseded by a permanent tariff containing no such requirement. Consequently, revision of the superceded tariff is not, and cannot, be at issue here. Rather, Globalcom requests a finding that the collocation requirement in the superseded tariff was anti-competitive by design and contrary to the parties ICA, and, as a remedy, that a termination charge in another tariff be waived for Globalcom. Rhythms Links is not relevant to those requests and, therefore, is inapposite to this proceeding.

In its request for review, Ameritech reiterates the analogous argument that the "filed rate doctrine" shields it from complaint so long as it adhered to the terms of its filed tariffs. Ameritech PR at 8, citing AT&T v. Central Office Telephone, 524 US 214, 118 S.Ct. 1956, 141 L.Ed. 222 (1998) and other cases. The filed rate doctrine "exists to protect the 'anti-discriminatory policy which lies at the heart of [common carrier statutes such as the Federal Act and the PUA]'." AT&T v. Central Office Telephone, 524 U.S. at 229 (Rehnquist concurring). It is typically invoked as a defense when a common carrier has offered to deviate from its tariff in order to discriminatorily benefit a specific customer, then reneged on that offer. Even when the carrier acted fraudulently, it cannot be faulted for insisting that the customer pay the tariffed rate or comply with tariffed conditions applicable to all customers.

In the present case, the issue is not whether Ameritech can be faulted for adhering to its Interim Compliance Tariff, but whether the tariff contained an anti-competitive provision. Globalcom is not requesting enforcement of terms or conditions that depart from the tariff, or punishment for Ameritech's conduct in connection with any transaction. Globalcom's claim is that the tariff itself was designed to, and did, impede competition and that remedies for *filing* that tariff – not for enforcing it - should be imposed pursuant to Section 13-514. The filed rate doctrine is inapplicable to that claim. "The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to is customers the services covered by the tariff. It does not serve as a shield against all actions based in state law." AT&T v. Central Office Telephone, 524 U.S. at 230-31 (Rehnquist concurring).

More importantly, Ameritech also argues that the Interim Compliance Tariff "represented a reasonable and good faith attempt to implement the provision of Section 13-801(d)(3)." Ameritech Init. Brief at 48. Ameritech emphasizes that the statute expressly requires that it offer the UNE combinations listed in Drafl Amendment I2A filed by Ameritech in Docket 00-0700". "Under the Draft I2A, an EEL is defined as a combination of unbundled local loop and unbundled dedicated transport, with the transport terminating in a CLEC's *collocation* arrangement." ***Id.*** (emphasis added). Ameritech argues that the collocation arrangement in I2A is not merely "ancillary" to the use of EELs, but inherent to their definition. *Id.*

Ameritech also contends that the collocation requirement was consistent with the FCC's "description of the purpose of EELs" in the UNE Remand Order. In this context, the FCC defined the EEL and its purpose as follows:

> The EEL allows requesting carriers to serve customers by extending a customer's loop from the end office serving that customer to a different end office in which the customer is' already collocated. The EEL, therefore, allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient high capacity facilities to their central switching location. Thus, collocation can be diminished through the use of the EEL[65].

Ameritech Init. Brief at 49, quoting the UNE Remand Order, para. 288 (emphasis added by Ameritech). Thus, Ameritech purports, "the clear intent and effect of the Interim Compliance Tariff was to promote, not impede, competition." ***Id.***

Additionally, Ameritech takes the position that the Commission, in effect, ratified the collocation requirement by approving the Interim Compliance Tariff in Docket 01-0586[66]. Ameritech stresses that in that proceeding we found that "good cause exists" to allow the tariff to take effect on fewer than 45 days notice. *Id.* at 50.

In return, Globalcom emphasizes the Commission's stated reasons for rejecting the collocation requirement in Docket 01-0614. With respect to the relationship between the purpose of the EEL and the collocation requirement, we said:

> ... Further, the FCC has specifically recognized in the definition of dedicated transport (which is one of the UNEs that make up an EEL) that it may terminate in places other

[64] I2A is attached to Ameritech Ex. 4.1 as Schedule **WKW-2.**

[65] Ameritech misquotes this sentence, which actually reads "Thus, the cost of collocation can **be** diminished through the use of the EEL."

[66] Illinois Bell TeleDhone Comoanv. Reauest for Special Permission to Place Into Effect On Less Than 45 Davs Notice Interim Compliance Tariff Pursuant to Section 9-201(a), Order, Sept. **18,** 2001.

> than a collocation arrangement...In arriving at this conclusion we specifically reject Ameritech's self-serving rationale for the legislature's requirement that it provide EELs. There is simply no indication that the legislature expressed any interest in limiting the use to which EELs might be put…In fact such a limitation would contradict the policy underpinnings of the new legislation as expressed in section 13-801(a): the 13-801(a) requirement that Ameritech provide interconnection, collocation, ahd network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings.

Docket 01-0614 at 77.

For the purpose of resolving the instant dispute, the Commission concludes that Ameritech's inclusion of a collocation requirement in the Interim Compliance Tariff was not reasonable in view of applicable law and administrative rulings. What we said regarding Section 13-801 ("nothing.,. remotely suggests a collocation requirement for the termination of EELs"[67]) applies, as well, to each of the pertinent laws and rulings affecting the provision of EELs by Ameritech. It should have been apparent to Ameritech in September, 2001, when it filed the Interim Compliance Tariff, that the applicable authorities were not merely devoid of a collocation requirement, but expressly negated it.

Subsection 13-801(d) establishes the broad duty to combine "any sequence of [UNEs] that it ordinarily combines for itself," and to do so "as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms and conditions." (Emphasis added.) Given the breadth and clarity of that statutory directive (as well as the admonition in subsection 13-801(a), quoted above, to provide UNEs "to the maximum extent possible"), Ameritech should have viewed limitations on the provision of UNEs, such as collocation, as exceptions requiring express authority. In this instance, such authority did not exist.

As early as 1999, in the UNE Remand Order cited by Ameritech, the FCC observed that "[e]xperience over the last year demonstrates that incumbent LECs have refused to provide access to network elements so that competitors could combine them, except in situations where competitive LECs have collocated in the incumbent's central offices."[68] Accordingly, the FCC stated:

> We note that we held previously in Bell South **271** Louisiana II that incumbent LECs may not limit a competitor's ability to access network elements in order *to* combine them *to* collocation arrangements. Specifically, we stated that "Bell

[67] **Docket** 01-0614 at *77.*
[68] UNE Remand Order, para. 482.

> South's offering in Louisiana of collocation as the sole method for combining unbundled network elements is inconsistent with section *251(c)(3)*." [Citation omitted.] This decision was based on our rule that requesting carriers are entitled to request any "technically feasible" methods of accessing and combining unbundled network elements. We found that section 251(c)(3) required incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point...," which was not limited to collocation arrangements. [Citation omitted.][69]

It does not matter that the FCC was discussing the Federal Act, not Section 13-801. As noted, Ameritech has explicitly relied on the UNE Remand Order as the source of its "description of the purpose" of an EEL. Furthermore, the relevant language of Section 13-801 essentially mirrors the federal language the FCC was addressing in the UNE Remand Order.

Moreover, as Ameritech knew in September, 2001, the FCC, in the Supplemental Order Clarification (in June, 2000), described three scenarios in which a requesting CLEC could convert a special access circuit to an EEL. The FCC plainly declared that under the third enumerated scenario, collocation is not required[70]. Even before that – i.e., "within days after the UNE Remand Order and Supplemental Order became effective" - Ameritech had posted guidelines for converting special access to UNEs. Ameritech Reply Brief at 50. "Both the original and updated guidelines made it clear that collocation is not required under the FCCs third local use test." Id.

Significantly, in Docket 01-0586, on which Ameritech also relies in support of the reasonableness of the collocation requirement in the Interim Compliance Tariff, Ameritech declared that the purpose of that tariff was to "implement tariff terms and conditions., .reflecting the Company's obligation to permit CLECs to reconfigure qualifying special access circuits to UNE loop-transport combinations in *a* manner consistent with the Supplemental Order Clarification issued by the [FCC]."[71] Ameritech thus acknowledged its obligation under that FCC order, but did not fulfill it. An across-the-board collocation requirement, whether applied to new EELs or converted circuits, was clearly inconsistent with the Supplemental Order Clarification.

In fact, it is immaterial that the FCC was addressing conversion in the Supplemental Order Clarification, rather than new EELs. The significant fact is that the FCCs ruling precluded the conclusion that an EEL necessarily involves collocation, from either a legal or technical standpoint. Further, the FCC's third option dispelled the notion advanced here by Ameritech that the sole purpose of an EEL, from the CLEC's perspective, is to lower the cost of collocation.

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[69] *Id.*, 973. fn. (emphasis added),
[70] Supplemental Order Clarification, para. 22.
[71] Docket 01-0586, Order at 1 (emphasis added).

As for Ameritech's contention that, by finding "good cause" to allow the Interim Compliance Tariff in Docket 01-0586, the Commission thereby established the reasonableness of the contents of that tariff, including the collocation requirement, we emphatically disagree. When a public utility under our jurisdiction files a tariff, the Commission can either suspend and investigate that tariff or "pass it to file" – that is, let it take effect without investigation after a period of time (45 days) determined by statute[72]. Upon request by the utility, that time period can be shortened for good cause. Docket 01-0586 involved such a request by Ameritech. Ameritech asserted that its Interim Compliance tariff should be passed to file without delay, while its permanent compliance tariff underwent investigation in another proceeding.

We acted eight calendar days after Ameritech filed its request. We concluded only that "good cause" existed to allow the filed tariff to take effect on an expedited basis, *so* that Ameritech could quickly begin offering services pursuant to its expanded obligations under Section 13-801. We did not address (much less determine) the reasonableness or underlying purpose of the collocation requirement in the Interim Compliance Tariff. "With a pass-to-file tariff, the [Commission] does not establish rates, exercise control over the rates, or go beyond fact gathering; instead it merely allows the rates to go into effect...[T]he Act does not require the [Commission] to review the rates before they become effective." A. Finkl & Sons Co., et al. v. Illinois Commerce Commission, et al., 325 Ill.App.3d 142, 150, 756 N.E.2d 933, 258 Ill.Dec. 659 (2001). A decision to pass a tariff to file "is not an inquiry into the propriety of the rates as in a formal hearing," and if we do not suspend the rates, "the utility is not required to justify its rates as it does in a formal hearing." *Id.,* 325 Ill.App.3d at 151. "Only after a formal hearing under [the PUA] does the [Commission] have to enter an order finding the rate changes 'just and reasonable'." *Id.*

The question here is not whether Ameritech was either allowed or required to act in accordance with its Interim Compliance Tariff. Once that tariff took effect, Ameritech was both. Rather, the question is whether Ameritech had a reasonable basis in September, 2001 for attaching a collocation requirement to EELs procured under that tariff. Ameritech offers our Order in Docket 01-0586 as proof of such reasonableness. However, as explained above, that Order never assessed the reasonableness of the contents of the tariff. At most, the Order implicitly indicates that the Interim Compliance Tariff was not *so prima facie* flawed in form that it could not pass to file. That is hardly proof of reasonableness, particularly when weighed against the UNE Remand Order, Supplemental Order Clarification, Section 13-801 and Ameritech's own special access conversion guidelines, all of which were known to Ameritech in September, 2001.

The Commission notes that we would be loath to pass tariffs to file, especially on abbreviated notice, if by doing *so* we were determining the reasonableness of the tariffs' contents or permanently inoculating them against subsequent regulatory scrutiny. Passing tariffs to file is helpful to carriers (by reducing the burden and delay of regulatory compliance) and to customers (who enjoy faster access to new or enhanced

[72] 220 ILCS 5/9-201, **see** also 220 ILCS 5/13-501.

services under non-discriminatory pricing). But in return for expeditious process, the carrier assumes the risk that, upon later review, the tariff will found unseasonable. In such instances, the carrier will not be faulted for enforcing the tariff (indeed, it must do so), but for filing an unreasonable tariff. Moreover, since the revision of the PUA in June, 2001, the carrier can now be held liable In damages for such unreasonableness.

Ameritech's other evidence of the reasonableness of the collocation requirement is the reference to Draft Amendment 12A in subsection 13-801(d)(3). Although it was not included in the statute, the definition of an EEL, as it appeared' in the Draft Amendment filed in Docket 00-0700, included collocation. Nevertheless, we repeat what we said in Docket 01-0614: "[S]ection 13-801(d)(3) speaks only to Ameritech's obligation to combine the 12A combinations but is silent in respect to the restrictions and conditions that were included in [12A], which are now only being reviewed by the Commission."[73] The Legislature's reference to 12A merely served to identify, without having to list at length, the minimum group of UNEs that Ameritech would have ***to*** make available under Section 13-801. We find no basis for Ameritech's presumption that the Legislature implicitly imported the collocation requirement of Amendment 12A into Section 13-801. This Commission, the FCC and Ameritech itself[74] define'an EEL **as** a combination of loop, dedicated transport and any necessary multiplexing, irrespective of collocation. It was not reasonable to assume that the Legislature intended, without saying so explicitly, to adopt a uniquely limited and technically unnecessary definition of the EEL.

It is one thing to rely on an express holding of the United States Court of Appeals, as Ameritech has done with regard to the Eighth Circuit, to support its refusal to perform the work of combining new EELs. It is a markedly different thing to rely on a unilaterally fashioned definition that derogates clear regulatory principles and has the self-serving effect of limiting the availability of EELs to competitors. Since, from the CLEC standpoint, an EEL is simply a less expensive means of accomplishing the same function with the same facilities as special access, the inference arises that the collocation requirement (which imposes additional expense on competitors) was simply a way of raising the cost of doing business for CLECs.

The Commission finds that such conduct offends Section 13-514 of the PUA in three respects, each constituting a per ***se*** impediment to competition. First, by violating subsection 13-801(d)(3) with its collocation requirement, Ameritech contravened subsection 13-514(11) ("violating the obligations of Section 13-801"). Second, Ameritech's unwarranted collocation requirement affronts subsection (6) of Section 13-514 ("unreasonably acting...in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers"). By improperly increasing competitive operating costs, the collocation requirement impaired Globalcom's ability to offer services. Third, Ameritech contravened subsection 13-

[73] Dckt. 01-0614 at 77.

[74] "Enhanced Extended Loop (EEL) is a combination of Unbundled Network Elements (UNEs) consisting of Unbundled Loops and Unbundled Dedicated Transport, combined using the appropriate Cross-Connects, and where need, multiplexing." Arner. Ex. 10.

514(10) ("unreasonably failing to offer network elements that the Commission or the [FCC] has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or [FCC's] orders or rules requiring such offerings"). As our review of the relevant authorities indicates, a collocation requirement was inconsistent with the orders of the FCC and this Commission.

Further, we find that Ameritech acted "knowingly," as that term appears in Section 13-514. Ameritech was familiar with the rulings, statutes and regulations pertinent to this issue and, indeed, participated in the proceedings that produced many of those authorities. Thus, Ameritech's complaint that we are imposing hindsight judgment here, Ameritech PR at 9, is incorrect. The Commission is not "relying" on our June, 2002 Order in Docket 01-0614, but reiterating some of what was said there, based on our assessment in this proceeding of what was known to Ameritech well before Docket 01-0614 was completed.

Globalcom also contends that the collocation requirement contravened the parties' ICA, which states: "Ameritech shall provide Requesting Carrier access to Network Elements via Collocation or any technically feasible method pursuant to **2.2** in a manner that shall allow Requesting Carrier to combine such Network Elements to provide a Telecommunications Service." Globalcom Ex. 4.0 at 25, quoting section IX.3.1 of the ICA; Amended Complaint at 15. However, while this provision obliges Ameritech to provide the UNEs that comprise an EEL, it does not require Ameritech to provide them in combined form. Thus, it does not obligate Ameritech to furnish new EELs. Consequently, the Commission cannot conclude that Ameritech's collocation requirement violated the parties' ICA by obstructing or contradicting a contractual right to new EELs accruing to Globalcom[75]. We observe that the parties did not supply the entire ICA for the record (relying instead on selected quotations), so we cannot evaluate the foregoing quoted language in context or interpret it in light *of* other contract provisions. We further note that the quoted passage establishes two alternatives for UNE access, one expressly involving collocation and one that does not, thus supplying further evidence that collocation is not an inherent feature of the EEL.

Having concluded that the collocation requirement was an impediment to competition under Section 13-514, it is nevertheless true that Globalcom did not request new EELs until December 19, 2001. Although Globalcom maintains that its concerns about Ameritech's policies discouraged earlier requests (e.g., Globalcom Ex. 5.0 at 3-4), it also acknowledges that "[o]ver the next few months [after the September 11, 2001 tragedy], our primary concern was ensuring that our network had sufficient redundancies to survive any future terrorist attacks." ***Id.*** at 4. Thus, any purchase of

[75] Since the quoted portion of the ICA does not address network elements that are already combined, and since the ICA (in Sched. 9.5, Sec. 2) expressly contemplates conversion of existing circuits, we would conclude that application of the collocation requirement to conversions unreasonably delayed implementation of the ICA, in violation of subsection 13-514(8). However, the record does not establish that Ameritech applied the collocation requirement to conversions and Globalcom has apparently abandoned that claim.

special access circuits prior to December 19, 2001, is not necessarily attributable to Ameritech's collocation requirement. Consequently, the Commission will offer remedial relief with respect to special access circuits purchased from Ameritech's intrastate tariff between December 19, 2001 and July 11, 2002, when Ameritech's permanent compliance tariff (without a collocation requirement) took effect, but not for any prior period. (We discuss specific remedies in a subsequent section of this Order.)

E. Staff's Additional Claim of Violation

Staff charges that Ameritech has violated Section 13-514 in a manner not claimed by Globalcom. According to Staff, Ameritech has "been under an obligation to permit CLECs to order conversion of special access circuits to EELs since the date of the Supplemental Order, if not the *UNE* Remand Order. Ameritech,concedes, however, that it did not, until September 12, 2001, comply with the requirement that it file Illinois tariffs for conversion of special access to EELs. Accordingly...Ameritech has violated Section 13-514(10)." Staff Init. Brief at 7.

In response, Ameritech emphasizes that this is Globalcom's complaint "and the only issue properly before the Commission is whether Globalcom has sustained its burden of proving the allegations of its Complaint, Globalcom did not allege...that Ameritech Illinois' alleged failure to file a tariff with terms and conditions for the conversion of special access circuits prior to September 18, 2001 violated Section 13-514." Ameritech Reply Brief at 45. Moreover, Ameritech stresses, before making that allegation, Globalcom would have been required, under subsection 13-515(c), to notify Ameritech of the alleged violation and give Ameritech 48 hours to correct the situation. *Id.* That did not occur, since Globalcom did not make the claim now made by Staff. Furthermore, Ameritech points out, there is nothing for Ameritech to correct, since it has already filed the appropriate tariff. ***Id.***

Staff is not exactly like other litigants in our contested proceedings. It appears on behalf of the agency, for the purpose of implementing the provisions of the PUA. When the Staff perceives a statutory violation, it is appropriate – indeed, it is essential – that the Staff present its opinion for our consideration.

That said, Staffs participation must nevertheless take place within the boundaries of due process. In this instance, Staff's claim was not raised during the evidentiary phase of this proceeding, although it certainly could have been. Consequently, Ameritech did not have an opportunity to mount an evidentiary response in direct opposition to Staffs position or its request for monetary penalties. Accordingly, the Commission will not consider Staffs charges in the context of this proceeding, although Staff can request an investigation or additional proceeding if it deems that advisable. In view of the foregoing conclusion, the Commission needs not comment on the other procedural and substantive defenses to Staffs charge that appear in Ameritech's Reply Brief.

F. Reconsideration **of The ALJ's** Ruling

In its post-record briefs, Globalcom urges the Commission to overrule (or the ALJ to reverse) a portion of the ALJ's partial grant of Ameritech's dismissal Motion. In the Amended Complaint, Globalcom requested that the Commission require Ameritech to convert interstate special access circuits to EELs without imposing the termination charges contained in Ameritech's FCC tariffs. However, the ALJ concluded: "Ameritech's operation under those tariffs is not in derogation of federal law and FCC regulations, and the Commission has no authority to 'direct Ameritech to depart from the terms of federal tariffs." ALJ's Ruling, July 5, 2002, at 12. Globalcom argues that the ALJ, first, misinterpreted FCC statements regarding termination charges and, second, wrongly concluded that this Commission lacks the power to contradict the FCC with respect to federal tariffs. Globalcom Init. Brief at 33-34.

Regarding the prior FCC rulings cited by the ALJ, Globalcom contends that, "while the FCC has stated that ILECs *may* impose termination charges upon the conversion of special access to EELs, it has not mandated that they impose those charges." *Id.* at 40 (emphasis in original). From that premise, Globalcom avers that this Commission remains free to exercise state authority to constrain Ameritech's enforcement of its federal access tariffs. Ameritech replies that the ALJ's interpretation of prior FCC rulings was confirmed by the FCC's recent decision in the VerizonNVorldcom Arbitration Decision[76]. There, Ameritech argues, the FCC "conclusively rejected a CLEC proposal to 'override the termination penalties contained in Verizon's special access tariffs,' stating: 'AT&T voluntarily purchased special access plans pursuant to Verizon's filed tariff and took advantage of discount pricing plans.. .We will not nullify these contractual arrangements...."' Ameritech Reply Brief at 29-30, quoting *Id.*, para. 348.

The Commission holds that ALJ correctly interpreted FCC rulings concerning termination penalties. While Globalcom is right that the FCC does not *require* carriers to impose termination charges on special access conversions, it is equally correct that the FCC will not overturn such tariffed charges when a provider, as here, elects to impose them. This is reflected in the FCC's choice in the VerizonNVorldcom Arbitration Decision to "decline to override" Verizon's tariffed termination penalties. Similarly, in the Verizon Pennsylvania 271 Order[77] the FCC stated that "our current rules do not require incumbent LECs to waive tariffed termination fees for carriers requesting special access circuit conversion." *Id.,* para. 75. In view of those FCC pronouncements, this Commission cannot say that Ameritech is violating FCC rulings and, on that basis, order Ameritech to bring its conduct under its federal tariffs into compliance.

Globalcom also maintains, however, that even if the ALJ correctly interpreted FCC rulings, this Commission nevertheless has authority to contradict the FCC in order to implement state law. Globalcom's primary authority for this proposition is subsection

[76] CC Docket No. 00-218, 00-249 and 00-251, Memorandum Opinion and Order, DA 02-1731, released July 17, 2002.
[77] FCC Dckt. 01-138, 16 FCC Rcd 17419, released Sept. 19, 2001.

251(d)(3) of the Federal Act, supra, which, according to Globalcom, blocks the FCC from precluding enforcement of "any state regulation, order or policy that establishes access obligations of local exchange carriers so long as the regulation, order or policy is consistent with the requirements of Section 251 and does not substantially prevent implementation of the requirements of the Act and its purposes." Globalcom Init. Brief at 34. Globalcom also relies on the United States Court of Appeals decision in IUB 1, ***supra,*** where the court said:

> It is entirely possible for a state' interconnection or access regulation, order, or policy to vary from a specific [FCC] regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

IUB 1, supra, at 806, quoted at Globalcom Init. Brief at 35.

The Commission concurs with Globalcom that subsection 251(d)(3) shields intrastate access rules from FCC preemption, even when those state provisions diverge from FCC pronouncements, so long as the state provisions are consistent with Section 251 and do not substantially prevent implementation of the Federal Act. As the court stated in IUB 1, "[w]ith subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets." Id. at 807 (emphasis added). Consequently, we are free to determine under state law, as we have here, that the conversion of special access to EELs, in the manner proposed by Globalcom, does not constitute termination under Ameritech's intrastate special access tariff. The FCC would apparently conclude otherwise with respect to federal tariffs, according to the FCC decisions cited in this proceeding by Ameritech. Nonetheless, since nothing in Section 251 or elsewhere in the Federal Act requires us to treat conversion as termination under state tariffs, subsection 251(d)(3) preserves our power to enforce the state's view of the matter, irrespective of FCC policy.

However, to enforce this state's view of federally tariffed termination charges, for the purpose of implementing state law, the Commission would need authority over the thing to which our remedy would apply (i.e., the pertinent federal tariffs). FCC tariffs pertain to interstate, not local, telecommunications services and exist exclusively under federal authority. There is no overlapping state/federal jurisdiction over them. We cannot stop the FCC from approving them initially, we cannot fault a carrier for enforcing them later in the manner intended by the FCC, and we cannot change the FCC's interpretations of them. Globalcom is apparently confusing jurisdiction over special access with jurisdiction over the tariffs authorizing special access. This Commission has power over special access, but only when it is provided under an Illinois tariff. Thus, subsection 251(d)(3) has no application in this instance. With regard to FCC

tariffs, there is no state power to require remedial action that would contravene FCC rulings regarding those tariffs.

That does not mean, though, that FCC tariffs can never be addressed and interpreted in administrative litigation before this Commission. If, for example, we were presented with a claim that a carrier was acting in violation of its FCC tariff, the Commission could, under Section 9-250 of the PUA, require the carrier to alter its conduct". In doing so, we would be enforcing an Illinois law requiring lawful operations by public utilities, and our remedy (compliance with the federal law) would not exceed our jurisdiction or place us in conflict with superior federal authority. **As** ,explained above, the reverse is not true, however. If a carrier were complying with its federal tariff, we could not order it to cease such compliance in order to satisfy the PUA. Our remedy would exceed our power and create conflict with superior federal authority. The carrier would simply look to the FCC for relief from our mandate and the FCC's authority to interpret and enforce federal tariffs would take precedence over our authority to enforce state law.

Nevertheless, Globalcom cites Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E.2d 1045, 98 Ill.Dec. 24 (1986) in support of the proposition that Illinois is not obliged to defer to federal power when presented with an alleged violation of Illinois law. Globalcom PR at 13. Kellerman does not sustain Globalcom's position, however. That case concerned a challenge to MCI's advertising practices under state anti-fraud laws. The court concluded that the complaint "involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates" and allowed plaintiffs to proceed. *Id.*, **112** Ill.2d at 443. But the court also said that "State attempts to regulate interstate carriers' charges or services, would be preempted by the [federal Telecommunications] Act." *Id.* (emphasis added). The instant case plainly falls into the latter category. Globalcom wants us to regulate Ameritech's interstate special access termination charges. Its claim is thus readily distinguishable from the general civil law claim that the Kellerman court appropriately said was not preempted by federal telecommunications law.

Additionally, we disagree with Globalcom that the foregoing conclusions are inconsistent with the decisions of the several state commissions discussed earlier in this Order that held either that conversion of special access to EELs is not a termination, or that termination penalties should be disallowed on state policy grounds. In contrast to the instant complaint case, each of those decisions arose from an arbitration proceeding concerning disputed portions of a prospective ICA between the parties (as did the additional arbitration decision – concerning an Ameritech affiliate - that Globalcom brought to our attention after the close of briefing in this docket[79]). We note initially that none of those decisions indicate whether the existing special access circuits addressed

[78] We could also act under Section 13-514 if the federal tariff violation were unreasonable and anti-competitive. See our discussion in subsection III.D.l of this Order with regard to substituting service under Ameritech's intrastate special access tariff for the same service under Ameritech's interstate tariff.

[79] Michgan Bell Telephone v. Level 3 Communications et al., Case No. 01-CV-70908, 2002 **U.S** Dist Lexis 17028 **(U.S** Dist. Ct., Eastern Dist. Michigan), Sept. 10, 2002.

by the subject commissions were purchased from state or federal tariffs. In any case', each 'of the Commissions was determining *the* contents *of a* prospective *ICA*, over which the state commission has express authority under Section 252 OF the Federal Act. Because of that authority, it is generally true that a state commission can consider excluding from an *ICA* those provisions that do not comport with the commission's view *of* either state or federal law (so'long as the state commission's view does not contravene Section 251 or obstruct implementation of the Federal Act)[80]. , .

However, even in an ICA arbitration, the state commission is required to ensure that its "resolution and conditions meet the requirements of section 251 [of the federal Act], including regulations prescribed *by the [FCC]* pursuant to section 251." 47 USC 252(C)(1) (emphasis added); see also, IUB 1 at 807. Thus, whatever power the state commissions have to limit or exclude federal special access termination charges from an ICA would disappear if the FCC promulgates, a formal *regulation* requiring enforcement of such charges (which it has yet to do). Moreover, the practical effects OF the decisions of our sister commissions, cited above, 'are not clear to this Commission. In each of the BellSouth/AT&T arbitrations, the precise question presented for arbitration was: "Under what rates, terms and conditions may AT&T purchase network elements or combinations to replace service currently purchased from BellSouth tariffs?"[81] The commissions' answers to that question dealt only with termination penalties and did not address the interrelationships among tarifh, existing service contracts and the ICA. Since the state commissions can neither invalidate an incumbent's federal tariffs nor alter the FCC's construction of them, the impact of a state commission's exclusion of interstate termination charges from an arbitrated ICA is not readily apparent to us.

That said, the present case is not an arbitration concerning the contents of a prospective ICA. Therefore, the action the Commission is being asked to take is not to establish the terms that will reside in an agreement, over which we have jurisdiction, but to limit the operation of a tariff under the power of a superior sovereign, when that sovereign would not impose such a limitation. We cannot impose that remedy in this complaint proceeding.

Globalcorn also maintains that we can interpret the parties existing ICA in a manner that disables Ameritech's interstate special access termination penalties. Despite our jurisdiction over the ICA, we cannot reach Globalcom's desired outcome through contract interpretation. Among the limited excerpts from the ICA that are properly in our record here, the only reference to termination charges is in Section 2.0.3 ("Requesting Carrier must pay any applicable ,termination charges for the Special Access Circuits that may be terminated early in order to convert to UNEs"). The

[80] Accordingly, as Giobalcom notes, the Commission could at least entertain the CLEC request in Level 3 Communications. Inc., ***supra,*** to disable interstate termination charges in the ICA under arbitration.

[81] E.g., in Re: Petition for Arbitration of the Interconnection Agreement Between AT&T Communications of the South Central States, Inc., TCG Midsouth, Inc., and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. 6252, Tennessee Regulatory Utility Commission Docket No. 00-00079, November 29, 2001, at 13.

interpretative task, therefore, is to identify the termination charges, if any, that are "applicable" under the interstate special access tariff. Nothing in the available excerpts from the ICA sheds light on that issue[82]. Beyond the ICA, however, the FCC has concluded that conversion to EELs does trigger early termination penalties under interstate special access tariffs. Consequently, with no contrary language from the ICA in the record, we have no choice but to conclude that, in the ICA, conversion is an "early termination" that triggers "applicable" charges under the interstate tariff.

Arguably, we could ignore the relevant FCC's rulings and conclude that interstate termination charges are not applicable within the meaning of the ICA, as we did earlier in this Order with regard to intrastate termination charges. However, if Ameritech nevertheless continued to enforce its federal tariffs (which are outside of the ICA) any attempt by this Commission to enforce the ICA would only set up a confrontation between our power over the ICA and the FCC's power over its tariffs. This would not be a constructive step, and we are not optimistic that we would prevail.

Accordingly, the Commission declines to reverse the ALJ's ruling on Ameritech's dismissal motion. Globalcom is not without recourse – at least nominally – since it can attack Ameritech's federal tariffs before the FCC. In practical terms, given the prior FCC rulings discussed in this Order, that would be an uphill battle.

G. Administrative Notice

In their briefs, the parties make several requests for the ALJ or the Commission to take administrative notice of documents not offered during the evidentiary hearings in this proceeding. Our evidentiary hearings are the designated conduit for presenting evidence intended for Commission consideration. Evidence adduced at hearing is subjected to the scrutiny of adversaries, so that its implications can be thoroughly explored. Post-record materials, particularly when first offered in a reply brief, circumvent that process. Our hearings are not mere discovery opportunities, during which parties identify potential weaknesses in their positions and endeavor to fill those weaknesses, beyond the reach of cross-examination and contrary evidence. Moreover, in this instance, the patties have not appended the pertinent documents to their pleadings so that the ALJ and the Commission can review them in their entirety. The patties' requests are all denied with regard to documents in existence before the record here was marked "heard and taken." Documents that came into existence afler that date were subjected to the customary rules of administrative notice, set forth at 83 Ill.Adm.Code 200.640 and considered accordingly.

[82] Presumably, in the ICAs that resulted from the BellSouth/AT&T arbitration proceedings discussed above, there would be language expressly precluding termination penalties for conversions of special access to EELs. Such language would obviously have assisted Globalcom here.

H. Remedies

Section 13-516[83] of the PUA prescribes the available remedies for violations of Section 13-514. The principal remedies are: a cease and desist order (under subsection (a)(1)); .financial penalties (under subsection (a)(2)); and damages, attorney's fees and costs (under subsection (a)(3)).

The remedies sought here by Globalcom have been reduced by the ALJ's ruling on Ameritech's dismissal motion and by the deletion of the collocation requirement from Ameritech's permanent compliance tariff. The remaining requested remedies are relief from termination charges upon conversion of special access to EELs, damages, penalties and attorney's fees. The Commission will address these in turn.

1. Cease and Desist Termination Charges

In Section D.1. of this Order, the Commission determined that under the particular circumstances here – that is, when the customer proposes to take EELs over the same facilities for the same or longer duration as the customer's original commitment to special access – there is no termination within the meaning of Ameritech's Illinois special access tariff. We further concluded that imposition of termination charges under 'those circumstances contravenes Section 13-514. Therefore, the Commission will grant Globalcom's request, as set forth in paragraph " B of its prayer for relief[84], that we order Ameritech to convert to EELs, without termination penalty, any special access circuits requested by Globalcom that were purchased From Ameritech's intrastate tariff, so long as the original time commitment is maintained. With respect to each such circuit, Ameritech's duty to convert, without termination penalty, ripens when that circuit meets all applicable requirements for conversion[85].

In Section D.2. of this Order, the Commission concluded that the collocation requirement in Ameritech's Interim Compliance Tariff was an impermissible impediment to competition under Section 13-514. Because of that impediment, Globalcom purchased special access circuits, rather than lower-cost EELs. We are thus presented with a basis for awarding relief to Globalcom that is independent *of* the basis for relief (tariff interpretation) set forth in the preceding paragraph. Accordingly, as a remedy for Ameritech's anti-competitive conduct, tho Commission orders Ameritech to convert lo EELs, without termination penalty, any special access circuits requested by Globalcom that were purchased from Ameritech's intrastate tariff between December 19, 2001 and July 11, 2002. With respect to each such circuit, Arneritech's duty to convert, without

[83] 220 ILCS 5/13-516.
[84] Amended Complaint at 25.
[85] For example, it appears that Globalcorn will still have to take certain measures to comply with the FCC's commingling prohibition before conversion can occur.

termination penally, ripens when that circuit meets all applicable requirements for conversion.

2. Damages

In view of our determination that the conversion of special access to EELs is not a termination under Ameritech's intrastate special access tarifl, Ameritech's assertion to the contrary has harmed Globalcorn. Therefore, the Commission will order Ameritech to pay damages, in the form ol refunds or account credits", in connection with any intrastate special access circuit under lease to Globacom on or after December 27, 2001 (the date on which Globalcom first requested conversion). Such damages should equal the difference between the special access rates Globalcom paid under Ameritech's Illinois tariff since December 27, 2001 and the EEL rates it would have paid for those circuits under Ameritech's Interim Compliance Tariff, and, thereafter, its permanent tariff.

Based on our conclusion that the collocation requirement in Ameritech's Interim Compliance Tariff was anticompetitive under Section 13-514 of the PUA, the Commission will require Ameritech to provide damages, in the form of refunds or account credits, in connection with any special access circuits initially purchased by Globalcom from Ameritech's intrastate tariff between December 19, 2001 and July 11, 2002. As recommended by Globalcom, the amount of damages should be based on "the difference between the rates that Globalcorn has actually paid to Ameritech for [such] special access circuits, and the rates that it would have paid if they had all been ordered under the EEL tariff that Ameritech filed on September 18, 2001.:' Globalcom Ex. 3.0 at 4.

Globalcom asserts that if "Ameritech's Interim Compliance Tariff had not had the illegal collocation requirement for new EELs, Globalcom could have ordered new DS3s as EELS and placed qualifying, existing month-to-month circuits on those new DS3s, along with new T-1 circuits ordered subsequent to December 27, 2001." Globalcom Init. Brief at 50-51. Therefore, Globalcom requests that its damages include the "difference between the special access rates it paid on all month-to-month circuits since December 27, 2001 and the EELs rates for those circuits." *Id.* at 51. To the extent that the damages in the preceding paragraph do not take such circuits into account, we find that those intrastate circuits should be included in the calculation of Globalcom's damages (with December **19,** rather than December 27, as the operative starting date for calculation).

Globalcorn additionally requests that the calculation of its damages should "end on the date that Globalcom is able to convert its circuits to EELs and begin paying EELs rates." *Id.* at 52. The Commission agrees, since that will account for the full duration Globalcom's damage. However, because we do not want Globalcom to "run the meter" of damages without limit, we require that Globalcom request the conversion of the

[86] As the aggrieved party, Globalcom can choose between these mechanisms

pertinent circuits to EELs within a reasonable time. If a later controversy arises with regard to this issue, the burden shall be on Ameritech to demonstrate unreasonableness.

Ameritech shall remit damages, by refund or account credit, within 60 days of conversion of a special access circuit to an EEL:

3. Penalties

Subsection 13-516(a)(2) *of* the PUA provides, infer *alia,* that:

> for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act..the Commission may impose penalties of up to $30,000 or 0.00825% of the telecommunications carrier's gross intrastate annual telecommunications revenue, whichever is greater...Each day *of* a continuing *offense* shall be treated as a separate violation for purposes of levying any penalty under this section.

83 Ill.Adm.Code 766.400 *et seq.* sets out specific procedures governing the imposition of penalties. Under 'subsection 13-516(b), the Commission may waive penalties "if it makes a written finding as to its reasons for waiving the penalty."

Globalcorn did not address penalties in its briefs in this proceeding. From that, the Commission can infer that Globalcom's penalty request was either mere boilerplate or has been abandoned. Even if Globalcom did not intend abandonment, its silence provides little reason for the Commission to expend the time and resources necessary to comply with the procedures detailed in 83 Ill.Adm.Code 766[87]. Staff does address penalties in its briefs, but in connection with an asserted violation that we have declined to consider in this docket. Staff Init. Brief at 15-17.

Accordingly, the Commission will waive penalties in this proceeding.

4. Attorney's Fees

The attorney's fees and costs authorized under subsection 13-516(a)(3) are mandatory in the event of a violation[88]. Nevertheless, the parties did not address this

[87] For example, Ameritech would have a right to a hearing, in order to address the "factors to be considered by the Commission" under Section 766.415 when assessing penalties, as well as a right to a written order under Section 766.410.

[88] "The Commission *shall* award damages, attorney's lees and costs to any telecommunications carrier that was subjected to a violation of Section 13-514." (Emphasis added.)

issue in their briefs. Furthermore, given the relatively recent birth of the applicable statute (effective June, 2001), the Commission has little experience in applying it.

We note that in civil litigation, fees and costs typically flow to the winning party. In our complaint proceedings, with manifold claims and the need to harmonize outcomes with our policies, there is often a "split decision," with each party winning some points and losing others. Such is the case here. Globalcom has prevailed on some claims, while others have been dismissed by the ALJ (with our affirmation) or rejected b,ythe Commission.

Therefore, to fulfill our obligation under subsection 13-516(a)(3), the Commission will 'require Ameritech to pay one-half of Globalcorn's attorney's fees and costs directly associated with this proceeding. This is an approximate quantification of Globalcorn's success in establishing violations of Section 13-514 here. Absolute precision,regarding this quantification is simply not practicable.

Contrary to Globalcorn's belated contention" in its review petition, subsection 13-516(a)(3) does not mandate an award of *a//*legal fees and costs. While something must be awarded, the magnitude of the award is left to our discretion. In this instance, Globalcom made claims without complying with the notice requirements of subsection 13-515(c), as well as a request for relief from tariffs beyond our jurisdiction. The Commission does not perceive public benefit in reimbursing Globalcom for the cost of asserting those claims. As for Globalcorn's argument that this conclusion is "contrary to" our fee award in Z-Tel Communications v. Illinois Bell Telephone, Globalcorn PR at 26, we established no standard for full fee reimbursement in that proceeding. The Commission will shape its fee and cost awards to suit the circumsta'nces of the particular case. In this instance, Ameritech will be responsible for all of its own expenses and half of Globalcorn's. We 'findthat to be an entirely equitable result.

The attorney's fees claimed by Globalcorn should be within the zone of reasonableness applicable to civil litigation. In any later controversy with regard to this issue, the burden shall be on Globalcorn to demonstrate reasonableness.

Pursuant to subsection 13-516(3), Ameritech shall pay its portion of Globalcorn's reasonable attorney's fees and costs within 60 days of the day on which this Order becomes final and can no longer be appealed, or within 60 days of receipt of a billing for such fees and costs from Globalcom, whichever is later.

[89] Globalcorn's argument that fees and costs are not appropriately brieied until after conclusion of a proceeding, Globaicom NR at 26, is plainly wrong. Proceedings under Section 13-515 are strictly lime-limited, absent agreement of the parties. There is no post-record opportunity to establish the basis for an award.

5. Costs OF the Proceeding

Under subsection 13-515(g)[90] of the PUA, the Commission is required to assess the costs of this proceeding to the parties. That provision states:

> The Commission shall assess the parties under this subsection for all of the Commission's costs of investigation' and conduct of the proceedings brought under this Section including but not limited to, the prorated ,salaries of staff, attorneys, hearing examiners, and support personnel and including any travel per diem,, directly attributable to the complaint brought pursuant to this Section, but excluding those costs provided for in subsection (f), diving the costs according to the resolution of the complaint brought under 'this Section. All assessments from made under this subsection shall be paid into the Public Utility Fund within 60 days after receiving notice of the assessments from the Commission.

We will allocate our cosls in the following manner: Ameritech will be responsible for *75%* and Globalcom Tor the remaining 25%. This is similar to our treatment of attorney's fees and costs, in which Ameritech was held responsible for its own expenses and half of Globalcorn's. The parties should adhere to the time requirements and other conditions set forth in subsection 13-515(g).

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, and being fully advised in the premises thereof, is of the opinion and finds that:

(1) Illinois Bell Telephone Company d/b/a Ameritech Illinois is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) Globalcorn, Inc., is an Illinois corporalion engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(3) the Commission has jurisdiction over Ameritech Illinois, Globalcom and the subject matter of this proceeding;

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[90] 220 ILCS 5/13-515(g).

(4) the recital of facts and law and the 'conclusions articulated in the prefatory portion of this Order are supported by evidence of record, and are hereby adopted as findings of fact and conclusions of law for the purposes of this Order;

(5) when Globalcom requests to convert a special access circuit currently purchased from Amerilech's intrastate special access tariff lo an EEL, there is no "termination" within the meaning of that tariff, for the purpose of collecting early termination charges, so long as Globalcorn agrees to purchase such EEL over the same or longer duration as Globalcom's original commitment to the special access circuit;

(6) any attempt by Ameritech to collect termination charges from Globalcom under the circumstances described in finding *(5)* was, or will be, a knowing and unreasonable impediment to the development of competition, prohibited under subsections (6), (8) and (11) of Seclion **13-514** of the Public Utilities Act;

(7) Ameritech should be required to cease and desist from attempting to collect terminalion charges from Globalcorn under the circumslances described in finding (5);

(8) Ameritech's prior attempts to impose termination charges on Globalcom under the circumstances described in finding (5) caused monetary damage to Globalcom and such damage'should be rectified by refunds or account credits, as described in the prefatory portion of this Order;

(9) Ameritech's inclusion of a collocation requirement for EELs in its Interim Compliance Tariff was a knowing and unreasonable impediment to the development of competition, prohibited under subsections (6), (10) and (11) of Section **13-514** of the Public Utilities Act;

(10) Ameritech should be prohibited from collecting termination charges from Globalcorn in connection with conversion of any special access circuit purchased from Ameritech's intrastate tariffs by Globalcom after December **19,** 2001 and while the collocation requirement described in finding (9) was in effect;

(11) Ameritech's inclusion of a collocation requirement for EELs in its Interim Compliance Tariff caused monetary damage to Globalcom and such damage should be rectified by refunds or account credits, as described in the prefatory portion of this Order:

(12) the Commission should waive statutory penalties for Ameritech in connection with the actions described in findings (5) and **(9)** above;

(13) Ameritech Illinois should be required to 'pay one-hall' of Globalcoin's reasonable attorney's fees and costs directly associated with this proceeding;

(14) Aineritech should be responsible for 75%, 'and Globalcom for 25%, of the Commission's costs of this proceeding, to be paid according to the terms set forth in subsection 13-515(g) of the PUA;

(15) the Administrative Law Judge's Ruling of July 5, 2002, partially granting Ameritech's dismissal motion, should be affirmed;

(16) insofar as the Administrative Law Judge's Written Decision is being set aside in favor ol' this Order of the Commission, the Petitions for Review filed by the parties in this proceeding should be granted;

(17) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed *of* 'in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that Arneritech Illinois shall cease and desist from collecting termination charges from Globalcom under the circumslances described in finding (5).

IT IS FURTHER ORDERED that Ameritech Illinois shall be prohibited from collecting termination charges from Globalcorn in connection with conversion of any special access circuil purchased from Ameritech Illinois' intrastate tariffs by Globalcom after December 19, 2001 and while the collocation requirement described in finding (9) was in effect.

IT IS FURTHER ORDERED that Ameritech Illinois shall pay *to* Globalcorn damages, in the form of refunds or account credits, as described in findings (8) and (11) above.

IT IS FURTHER ORDERED that Ameritech Illinois shall pay to Globalcorn one-half of Globalcom's reasonable attorney's fees and costs directly associated with this proceeding.

IT IS FURTHER ORDERED that slatutory penalties For Ameritech are hereby waived in this proceeding.

IT IS FURTHER ORDERED that Ameritech Illinois should pay 75%, and Globalcom should pay 25%, of the Commission's costs of this proceeding, with such costs being paid according to the terms set forth in subsection 13-515(g) of the PUA.

IT IS FURTHER ORDERED that the Administrative Law Judge's Ruling of July 5, 2002, partially granting Ameritech's dismissal motion, is hereby affirmed.

IT IS FURTHER ORDERED that, insofar as the Administrative Law Judge's Written Decision is set aside in favor of this Order of the Commission, the Petitions for Review filed by the parties in this proceeding are hereby granted.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 23rd day of October, 2002.

(SIGNED) KEVIN K. WRIGHT

Chairman

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: **02-0365**

I, DONNA **M.** CATON, do hereby certify that **I** am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of order made and entered of record by said Commission on October 23,2002.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on October **24,** 2002.

Donna M. Caton

Chief Clerk